No. 2274

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

HEWITT INVESTMENT COMPANY, a corporation,

Appellant,

vs.

MINNESOTA AND OREGON LAND AND TIMBER COMPANY, a corporation, and E. Z. FERGUSON,

Appellee.

Upon Appeal from the United States District Court For the District of Oregon.

TRANSCRIPT OF RECORD.

Friends of U.S. Grant
Court of Honor
822

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Appellee.

Names and Addresses of Attorneys upon this Appeal:

For the Appellant:

E. R. York, Fidelity Bldg., Tacoma, Wash.

For the Appellees:

C. W. Fulton, Yeon Bldg., Portland, Ore.

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In the District Court of the United States for the District of Oregon.

Be it remembered, That on the 13 day of March 1911, there was duly filed in the Circuit Court of the United States for the District of Oregon,, an Amended Bill of Complaint in words and figures as follows, to wit:

[Amended Complaint.]

In the Circuit Court of the United States for the District of Oregon.

MINNESOTA AND OREGON LAND AND TIMBER COMPANY, a corporation, and E. Z. FERGUSON,

Plaintiffs,

vs.

HEWITT INVESMENT COMPANY, a corporation,

Defendant.

Plaintiffs, for their cause of suit against the defendant, by this, their amended complaint, allege:

That the plaintiff, Minnesota and Oregon Land and Timber Company is and at and during all the times hereinafter mentioned was a private corporation organized and existing under the laws of the State of Minnesota, and doing business as such in its said corporate name of Minnesota and Oregon Land and Timber Company.

That the defendant is and at and during all the times hereinafter mentioned was a private corporation organized and existing under the laws of the

State of Washington, and doing business as such in Oregon and elsewhere in its said corporate name of Hewitt Investment Company.

That the following described real estate, to-wit: The Southeast quarter of the Northeast quarter and the Northeast quarter of the Southeast quarter of Section Ten; the Southwest quarter of the Northwest quarter and the Northwest quarter of the Southwest quarter of Section Eleven; the Southeast quarter of Section Seventeen; the East half of the Northwest quarter and the West half of the Northeast quarter of Section Twenty, and the Northeast quarter of Section Thirty, all in Township Six North of Range Six West of the Willamette Meridian, all in Clatsop County, Oregon, is wild timber land situated in said County and State, and is not in the actual or other possession of defendant or any person whatever, but is wholly unoccupied.

That on or about the .....day of December, 1905, the plaintiffs desired and agreed to purchase said real estate for the use and benefit of the plaintiff corporation and as its property, taking the legal title thereto in the name of the plaintiff Ferguson, who was to hold the same for the use and benefit of the plaintiff corporation, which was to furnish and pay the purchase price therefor; and the defendant, who was at said time the owner of said real estate, being desirous of selling said real estate, an agreement was made by and between plaintiff Ferguson and defendant whereby they agreed, each in consideration of the agreements and undertakings of the other that plaint-

iff Ferguson would pay defendant for said real estate the sum of $12,800.00; that for said price defendant would sell and convey said real estate unto said Ferguson as grantee by a deed of the kind hereinafter mentioned, barring the error therein; that defendant would make and deliver said deed to the Astoria National Bank, a national bank at Astoria, Oregon, duly organized and existing under the laws of the United States, to be held by said bank in escrow and to be delivered by it to plaintiff Ferguson upon his paying said bank said sum of money; and that upon the payment of said sum of money to said bank by plaintiff Ferguson, he would become the owner of said real estate and said deed would be delivered by said bank to him, which said agreement was and is in writing.

That while said deed was to be executed to plaintiff Ferguson as grantee, defendant was informed by plaintiff Ferguson and well knew at the time said agreement was made and at all times thereafter, that plaintiff Ferguson was purchasing said real estate for the plaintiff corporation and with its money.

That thereafter defendant made and executed a deed for said real estate, in which plaintiff Ferguson was duly designated and named as the grantee, and on or about the 22nd day of December, 1905, in conformity to said agreement, delivered the same to the said Astoria National Bank to hold in escrow, and instructed said bank to deliver the said deed to plaintiff Ferguson upon his paying to it for defendant $12,800.00.

That said deed contained a covenant, wherein and whereby defendant covenanted and agreed that it was the owner in fee of said real estate, that the same was free and clear of incumbrance, and that it and its successors would forever warrant and defend the title thereto unto said E. Z. Ferguson, his heirs and assigns, against all lawful claims and demands whatsoever.

That while said deed was duly witnessed, acknowledged and attested and was duly signed and executed by defendant in all other respects and particulars, by an inadvertance or mistake the said real estate was mentioned therein as being in Township Six (6) South of Range Six (6) West, instead of Township Six (6) North of Range Six (6) West, although said real estate was mentioned and described in said deed as being in Clatsop County, Oregon, was the only real estate in said County owned by defendant, and the description thereof in all other respects and particulars was accurate and correct.

That the only townships in said County are West of the Willamette Meridian, and North of the Established Base Line of and for United States Governmental surveys within said State, and accordingly are necessarily numbered, designated and known as townships North, being numbered as such with reference to said Base Line.

That on or about the 3d day of January, 1906, the plaintiff Ferguson in accordance with said agreement and the conditions and terms of said escrow duly paid unto the said Astoria National Bank for defendant the said sum of $12,800.00, the full purchase price for said

real estate; and the said bank accepted the same for said defendant; and plaintiffs thereby duly and fully paid the purchase price for said real estate, duly and fully performed and fulfilled the conditions of said escrow, became entitled to the delivery of the said deed, and as plaintiffs are informed and believe and accordingly allege, as a fact, became the purchasers and owners in fee of said real estate.

That by and according to said agreement and the terms and conditions of said escrow, defendant was to furnish and convey unto plaintiff Ferguson a clear or valid record and marketable title to said real estate. That at or about the time said purchase price for said real estate was paid, plaintiff Ferguson discovered the said defect or error in said deed, and requested defendant to correct the same, and defendant promised and agreed to do so, and requested plaintiff Ferguson to consent to a delivery and entrusting of same deed to one Henry Hewitt, Jr., who is and at and during all the times herein mentioned was, the President and Managing Agent of defendant, for the purpose of having said error therein corrected either by the alteration of said deed itself or the execution of a new deed to be used as a substitute therefor, and returned and delivered to said bank again for plaintiffs.

That relying upon said agreement and representation by defendant, plaintiff Ferguson consented to the delivery and entrusting of said deed to said Henry Hewitt, Jr., from whom and through whom defendant has procured the possession of the same.

That plaintiffs have never nor has either of them ever

agreed or consented to any delivery of said deed by said bank or otherwise to any person or persons other than plaintiffs, except the delivery and entrusting thereof unto said Henry Hewitt, Jr., for the purpose of correcting said error therein, and for no other purpose.

That said purchase was made for the use and benefit of the plaintiff corporation and said purchase price of said real estate was and is furnished and paid by said plaintiff corporation.

That defendant was the owner of said real estate at all times herein mentioned prior to the payment of said purchase price to said bank, and that it has been the owner thereof at all times since said payment and is still the owner thereof unless plaintiffs became the owners thereof upon the payment of said purchase price and their compliance thereby with the terms and conditions of said escrow; but that plaintiffs are informed and believe and accordingly allege as a fact, that they are and ever since the time of the payment of said purchase price to said bank have been the owners of said real estate, the bare legal title thereto being in plaintiff Ferguson, nevertheless the defendant wrongly claims to be the owner thereof.

That said deed was intended by both plaintiffs and defendant to describe said real estate accurately and said error or defect therein was and is wholly unintentional and due to and caused by a mistake, and error by defendant for which neither of plaintiffs is in any way responsible.

That defendant has wholly failed to correct said deed either by the alteration thereof or by the execution of a

new deed to be substituted therefor or otherwise, or to deliver said or any deed either unto said bank to be delivered to plaintiffs or either of them on the payment of said purchase price or otherwise or unto plaintiffs or either of them directly upon the payment of said purchase price or otherwise, and has refused and still refuses so to do, although often requested by plaintiffs so to do.

That plaintiffs are, and at and during all the times herein mentioned were ready and willing to pay over and deliver to defendant said purchase price or sum of $12,800.00 upon the execution and delivery to said Ferguson of a deed of conveyance conveying to him the said real estate, or correct, as aforesaid, and redeliver to him the deed so withdrawn from escrow as aforesaid; and since the payment of said purchase price unto said bank and prior to the commencement of this suit plaintiffs have at various times notified defendant that they were willing so to do, and have offered so to do, but defendant has at all times refused and still refuses so to do.

That plaintiffs, prior to the commencement of this suit, tendered and offered to pay to defendant said sum of $12,800.00 if it would either correct the aforesaid error in said deed so withdrawn and redeliver it or would execute and deliver to said Ferguson a deed conveying said lands to him, but defendant refused and still refuses to do either, and plaintiffs accordingly bring said sum of money into Court with their complaint to be paid over and delivered to defendant when by this court plaintiffs or plaintiff Ferguson will have been awarded a decree

vesting in plaintiffs or either of them the title to said real estate.

WHEREFOR, Plaintiffs pray:

1. That if the court shall hold under the facts herein alleged that the title to the real estate hereinbefore described passed to plaintiffs or either of them when said purchase price of said real estate was paid into said bank, then plaintiffs be decreed to be the owners of said real estate, the legal title thereto being in and held by plaintiff Ferguson, and defendant be adjudged and decreed to have no right, title, claim or interest therein, and be forever barred from all claim to any estate or interest in said property.

2. That if, however, the court shall hold that said title did not pass at said time to plaintiffs or either of them than that a decree be entered vesting the legal title in and to said real estate in plaintiff Ferguson and the equitable title thereto in the plaintiff corporation, and ordering, directing and requiring the defendant to execute and deliver to the plaintiff Ferguson a deed or instrument in writing granting, bargaining, selling and conveying to him, his heirs and assigns, forever, free of all liens and encumbrances the said real estate, and that if defendant shall fail so to do within a time fixed by this court, that a commissioner be appointed by this court to make, execute and deliver such deed and that until such deed be executed either by defendant or such commissioner, the decree of this court operate and stand for such conveyance.

3. That plaintiffs have and recover of and from defendant their costs and disbursements in this suit, and

that plaintiffs have such other and further relief as in equity may appear proper and just.

C. W. FULTON,
Attorney for plaintiffs.

[Endorsed]: Amended Bill of Complaint. Filed March 13-1911.

G. H. MARSH,
clerk.

And afterwards, to wit, on the 29 day of May, 1911, there was duly filed in said Court, an Answer in words and figures as follows, to-wit:

[Answer.]

In the Circuit Court of the United States for the District of Oregon.

MINNESOTA AND OREGON LAND AND TIMBER COMPANY, a Corporation, and E. Z. FERGUSON,

Plaintiffs,

vs.

HEWITT INVESTMENT COMPANY, a Corporation,

Defendant.

The answer of the Hewitt Investment Company, defendant, to the amended bill of complaint.

This defendant, saving and reserving unto itself the benefit of all exceptions to the errors and imperfections in said amended bill contained, for answer to so much thereof as it is advised it is necessary or material for it to answer unto, does aver and say:

It denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegation that the plaintiff, Minnesota and Oregon Land and Timber Company, is or at any time was a corporation organized or existing under the laws of the state of Minnesota, or was or is doing business in said corporate name.

It admits that it is and was at all times mentioned in said amended bill a private corporation organized and existing under the laws of the State of Washington, and at all said times had and has its principal place of business in the City of Tacoma, State of Washington, and denies that it was doing business as such in the State of Oregon.

It admits that the lands described in the amended bill are wild timber lands situate in Clatsop County, Oregon, and are unoccupied, and avers that all of said lands are now and have been at all times herein mentioned in the possession of this defendant.

It denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations that in December, 1905, plaintiffs desired or agreed to purchase said lands for the use or benefit of said plaintiff corporation or as its property or to take the legal title thereto in the name of the plaintiff Ferguson, or that said Ferguson was to hold the same for the use or benefit of the plaintiff corporation, or that said plaintiff corporation was to furnish or pay the purchase price therefor; and denies that any agreement was made by or between the plaintiff Ferguson and the defendant, whereby they agreed for any consideration that said Ferguson would pay defendant for said lands the sum of $12,800,

or agreed that for said price defendant would sell or convey said lands to said Ferguson as grantee by any deed, or that the defendant would make or deliver such deed to the Astoria National Bank, of Astoria, Oregon, to be held by said bank in escrow or to be delivered by said bank to plaintiff Ferguson upon his paying said bank said sum of money, or that upon payment of said sum of money to said bank by said plaintiff Ferguson he would become the owner of said lands, or that said deed would be delivered by said bank to said Ferguson, and denies that any such agreement was or is in writing.

It avers that prior to or in the month of December, 1905, plaintiff Ferguson and Henry Hewitt Jr., of Tacoma, Washington, had a personal oral understanding, whereby it was understood between them that the defendant would sell and convey to plaintiff Ferguson the land above referred to and described in said amended bill in consideration of the sum of $12,800 net in Tacoma funds to be paid by said Ferguson to defendant and in further consideration and upon condition that said Ferguson could and would procure and deliver to defendant, in exchange therefor, at and for an equal price based upon the estimate of timber thereon at fifty cents per thousand stumpage, the title to a quantity of other timber lands, containing an equal estimate, or more of timber, situate in Columbia County, State of Oregon, lying adjoining certain timber lands then owned by defendant in Township 5 North Ranges 3 and 4 West, W. M.; and it denies that said sum of $12,800, or any part thereof, was ever paid to defendant, or that any of the conditions or considerations for said conveyance were ever

performed or paid by said Ferguson, or any one on his behalf; and avers that said Ferguson has at all times wholly failed and refused to keep or perform the same.

It denies that it was informed by said Ferguson, or by any one, or had any knowledge, at any time prior to the commencement of this suit, that said Ferguson was purchasing, or attempting to purchase, said lands for the plaintiff corporation or with its money.

It admits that on or about December 22, 1905, in conformity with said oral understanding between plaintiff Ferguson and said Henry Hewitt Jr., a deed of conveyance of land to the plaintiff Ferguson as grantee therein was procured by said Henry Hewitt Jr., to be signed in the name of defendant upon representations made by said Henry Hewitt Jr., to defendant that plaintiff Ferguson could and would procure and convey to defendant in exchange therefor those certain other lands above referred to lying adjoining timber lands then owned by defendant in Columbia County, Oregon; and admits that on or about said date said deed was mailed by said Henry Hewitt Jr. to the Astoria National Bank, at Astoria, Oregon, to be held by said bank for delivery to said Ferguson upon payment by said Ferguson to defendant of the sum of $12,800 net in Tacoma funds and performance by said Ferguson of the terms and conditions of his oral understanding with said Henry Hewitt Jr., as herein averred, as a part of the consideration for said conveyance of the lands described in said deed; it denies that said deed was delivered to said bank to be held by said bank in escrow, or was to be delivered by said bank to plaintiff Ferguson upon his paying to

said bank said sum of $12,800; it denies that said Ferguson ever paid said sum of $12,800, or any part thereof, to defendant, and denies that said Ferguson ever paid said sum of money to said bank, if at all, except upon the condition that said money should be held by said bank and paid to defendant only when the title to said lands should be perfected in said Ferguson, and it avers that said bank received and held said money, if at all, as the agent of said Ferguson subject to said condition, and avers that said condition has never been complied with, and said bank has never paid over said money, or any part thereof, to defendant.

It denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations that said deed contained a covenant wherein or whereby defendant covenanted or agreed that it was the owner in fee of the lands therein described, or that said lands were free or clear of encumbrance, or that it or its successors would warrant or defend the title thereto unto said Ferguson or his heirs or assigns, or that said deed was duly witnessed, acknowledged or attested, or was duly signed or executed by defendant; and avers that any such deed signed in the name of defendant was so signed by its officers without any authorization or authority given to or conferred upon said officers to sign, execute, acknowledge or deliver such deed in the name of or on behalf of defendant, and it avers that defendant never received any consideration therefor, and that defendant was not then or at any time the owner of the lands described in or purported to be conveyed by said deed; it denies that it has any knowl-

edge or information as to when or where or by whom said deed was prepared, or what lands were described therein or were intended or purported to be conveyed thereby; or whether the lands described in said deed were erroneously described by inadvertence or mistake.

It denies that it has knowledge or information sufficient to form a belief as to the truth of the allegation that on or about January 3rd, 1906, plaintiff Ferguson paid to said Astoria National Bank for defendant said sum of $12,800; it denies that any such payment was made in accordance or compliance with any agreement between said Ferguson and this defendant, or with the oral understanding between said Ferguson and said Henry Hewitt Jr.; it denies that said money was received or at any time held by said bank, if at all, except upon certain restrictive terms and conditions precedent required to be performed and complied with before said money, or any part thereof, should or could be paid over by said bank, and denies that this defendant ever agreed or consented to such terms or conditions, or that such terms or conditions have ever been performed or complied with by said Ferguson on his part, or that this defendant has been able to perform or comply with the same on its part; it denies that this defendant has ever received said money, or any part thereof, or that said bank accepted said money for the defendant, or in any manner, if at all, except as agent for the plaintiff Ferguson and upon said restrictive terms and conditions; it denies that plaintiffs, or either of them, have ever paid to defend-

ant any money for said lands, or have performed or fulfilled the terms or conditions of the oral understanding between said Ferguson and said Henry Hewitt Jr. for the sale and exchange thereof; and denies that plaintiffs, or either of them, ever became or are entitled to the delivery of said deed, or any deed of conveyance of said lands, or became or are the purchasers or owners in fee of said lands, or any part thereof.

It denies that by or according to any agreement of defendant, or by the terms or conditions of any escrow, it was to furnish or convey to said Ferguson a clear or valid record or marketable title to said lands.

It admits that the plaintiff Ferguson requested defendant to correct the deed alleged in the amended bill, but it denies that defendant promised or agreed so to do, and denies that it requested plaintiff Ferguson to consent to a delivery or entrusting of said deed to Henry Hewitt Jr. for correction or alteration of said deed, or for the execution of a new deed to be used as a substitute therefor, and returned or delivered to said bank again for plaintiffs or either of them; and denies that relying upon such agreement or representation, or any agreement or representation, by defendant said Ferguson consented to the delivery or entrusting of said deed to said Henry Hewitt Jr. It denies that plaintiffs, or either of them, never agreed or consented to any delivery of said deed by said bank or otherwise to any other person or persons than plaintiffs, and it avers that said deed was on or about the 9th day of January 1906, at the request of

said Ferguson, returned by said bank to this defendant.

It denies that said attempted purchase of said lands was for the use or benefit of plaintiff corporation, and denies that the purchase price of said lands was or is furnished or paid by plaintiff corporation.

It admits that defendant was the owner of the lands described in said amended bill at the time therein alleged, and that it has at all times since been and is now the owner thereof; it denies that plaintiffs, or either of them, became the owners of said lands upon or by payment of the purchase price therefor or by compliance with the terms or conditions of any agreement or escrow made with defendant or said Henry Hewitt Jr.; it denies that plaintiffs, or either of them, are or ever have been the owners of said lands, and denies that any title thereto is in plaintiff Ferguson; and denies that defendant's ownership thereof is wrongfully claimed.

It denies that it has any knowledge or information as to what lands said deed was intended by both plaintiffs and defendant to describe, or whether any error or defect therein was unintentional or due to or caused by mistake, and it denies that the plaintiff corporation had any intention in connection therewith or interest therein to the knowledge of defendant.

It admits that it has not corrected said deed by alteration thereof or execution of a new deed to be substituted therefor, or otherwise, and admits that it has not delivered said deed, or any other deed, to said bank or to plaintiffs or either of them, and has refused

and refuses so to do; and avers that it has failed and refused so to do for the reason that plaintiff Ferguson did not at any time prior to the commencement of this suit pay or tender to defendant the purchase price for said lands and keep or perform the condition of the oral understanding between said Ferguson and said Henry Hewitt Jr., which were the considerations agreed upon by them for the conveyance of the title to said lands, viz: to procure and deliver to defendant in exchange therefor the title to the other timber lands as hereinbefore alleged.

It denies that plaintiffs were at all or at any times prior to the commencement of this suit ready or willing to pay or deliver to defendant the agreed purchase price or the sum of $12,800 and perform the conditions of said oral understanding between said Ferguson and said Henry Hewitt Jr. which were to be the consideration for the delivery to said Ferguson of a deed of conveyance of said lands; and denies that at any time prior to the commencement of this suit plaintiffs ever notified defendant that they were willing or offered so to do; and denies that plaintiffs prior to the commencement of this suit tendered or offered to pay to defendant said sum of $12,800 if defendant would correct the alleged error in said deed and deliver it or would execute and deliver a deed to said Ferguson a deed conveying said lands to him.

And defendant avers that neither the agreement alleged in said amended bill of complaint, nor the oral understanding herein averred, nor any agreement, between the plaintiff Ferguson and the defendant,

for the sale and conveyance of the lands described in said amended bill, was made or evidenced by deed or any writing which expressed the consideration thereof, or was subscribed by the parties thereto, or to be charged thereby, or by any person thereunto by said Ferguson or the defendant lawfully authorized; and avers that no money or other consideration was ever paid to or received by defendant for said agreements, or either of them, or for the sale or conveyance of said lands or any part thereof, and the plaintiffs, or either of them, have never entered into or taken possession of said lands, or any part thereof, or expended any money or made any improvements or paid any taxes thereon; and defendant avers that it has since the year 1905 paid all taxes which have been levied and assessed upon the said lands up to the present year, and has paid for such taxes for the year 1905 $154.05, for the year 1906 $186.33, for the year 1907 $183.16, for the year 1908 $198.80, for the year 1909 $209.98 and for the year 1910 $230.70, for the purpose of protecting and keeping clear from tax liens defendant's title to said lands, and fully believing that it was at all said times the owner in fee of the title to said lands.

And having thus fully made answer to said amended bill, defendant prays the decree of the court that the plaiitiff, or either of them, have no right, title, interest or claim to or in the lands described in said amended bill and recover nothing in this suit, and that defendant may have and recover its costs against plaintiffs; and if plaintiffs, or either of them, shall be al-

lowed any relief or decree to have any right, title or interest to or in said lands, then defendant prays that it may have such relief as may be just and equitable in the premises.

E. R. YORK
Attorney for Defendant.
HEWITT INVESTMENT COMPANY
By Henry Hewitt Jr.
Its President

[Endorsed] Answer. Filed May 29, 1911.
G. H. MARSH
Clerk

And Afterwards, to wit, on the 1 day of July 1911 there was duly filed in said Court, a replication in words and figures as follows, to wit:

[Replication.]

In the Circuit Court of the United States for the District of Oregon.

MINNESOTA AND OREGON LAND AND TIMBER COMPANY, a corporation, and E. Z. FERGUSON,

Plaintiffs,

vs.

HEWITT INVESMENT COMPANY, a corporation,

Defendant.

The replication of Minnesota and Oregon Land and Timber Company, a corporation, and E. Z. Ferguson, plaintiffs, to the answer of Hewitt Investment Company, a corporation, defendant:—

These repliants saving and reserving unto themselves now and at all times hereinafter, all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto, say, that they will aver, maintain, and prove, their said Bill of Complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by these repliants. Without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law, to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true. All which matters and things these repliants are and will be ready to aver, maintain, and prove, as this honorable court shall direct, and humbly pray as in their said bill they have already prayed.

C. W. FULTON
Solicitor for Plaintiffs.

[Endorsed] Replication Filed Jul 1, 1911
G. H. MARSH
Clerk

And afterwards, to wit, on the 3 day of February 1912 there was duly filed in said Court, an opinion in words and figures as follows, to wit:

[Opinion.]

In the Circuit Court of the United States for the District of Oregon.

No. 3125.

MINNESOTA and OREGON LAND AND TIMBER COMPANY, (A corporation) and E. Z. FURGUSON,

Plaintiffs,

v.

HEWITT INVESTMENT COMPANY (a corporation)

Defendant.

C. W. FULTON for Plaintiffs,

E. R. YORK for Defendant.

This is a suit to compel the specific performance of an alleged contract or agreement for the sale and conveyance of certain real property by the defendant, the Hewitt Investment Company, to the plaintiff Minnesota and Oregon Land and Timber Company. The plaintiff E. Z. Ferguson was the agent of the Land and Timber Company, and was authorized to contract for and to purchase timber lands for said company in his name. About December 22, 1905, the defendant Investment Company executed to Ferguson a deed to 640 acres of timber-land situated in Clatsop County, Oregon. On that date Henry Hewitt, Jr., who was the president of the Investment Company, transmitted the deed from Tacoma, Washington, to the Astoria National Bank in Astoria, Oregon, with directions to the bank to deliver the deed to Ferguson for $12,800 net to the grantor in Tacoma funds. The letter and deed were received by the bank on the following day. The $12,800 was paid into the bank by Ferguson on January 3, 1906, with instructions to deliver the same, when the title to the land should be made perfect in him, Ferguson, to the Invest-

ment Company in Tacoma Exchange, and that, pending the perfecting of said title, the bank should hold the money and deed in its possession. Ferguson at the time specified certain defects in the title which needed correction. On January 5th the Investment Company requested of the bank a return of the deed. The deed was returned on January 9th for correction. Thereafter the Investment Company kept the deed, and finally refused to make any correction, or to return the same to the bank, or to deliver it to Ferguson.

The plaintiffs allege, in effect, that the deed was deposited with the bank in escrow, so understood and treated by all the parties, and that it, together with the arrangement whereby it was so placed in escrow, and the letters passing between the parties attending the transaction, constituted a valid and binding contract, whereby the defendant agreed to sell and the plaintiffs to purchase the lands described in the deed at and for the consideration of $12,800, and that plaintiffs are entitled to have the same specifically enforced.

The defendant controverts the claim of plaintiffs, and avers that Ferguson and Henry Hewitt, Jr., had a personal understanding, but not in writing, whereby it was agreed between them that defendant should sell and convey to the plaintiff Ferguson the lands described in the deed for the consideration of the sum of $12,800 in Tacoma funds to be paid by Ferguson to defendant, and in further consideration that Ferguson could and would procure and deliver to defendant in exchange therefor, at and for an equal price, based upon the estimate of timber thereon at 50 cents per thousand feet of stump,

age, the title to a quantity of other timber-lands containing an equal estimate or more of timber situated in Columbia County, Oregon, lying adjoining certain timber-lands then owned by defendant. These averments are denied.

Wolverton, District Judge:

That the parties—Henry Hewitt, Jr., acting on the one part and E. Z. Ferguson on the other—had an understanding that the defendant company should deed the lands in dispute to Ferguson for a consideration of $12,800 there is no dispute. But there is a dispute as to whether Ferguson, as further part consideration for the sale to him, agreed to secure other lands for the defendant company adjoining some that it held in Columbia County. It is also disputed that the deed was delivered to the bank in escrow, and it is affirmed that whatever negotiations might have taken place relative to the sale of such lands by defendant company to Ferguson were not in writing, and therefor not binding or obligatory upon the defendant. There is a controversy also whether the negotiations were had with the defendant company or with Henry Hewitt, Jr., individually and upon his own account, and whether the company or its officers were authorized to execute the deed in question.

The negotiations were attended with considerable correspondence, and it will aid us materially first to take note of that. On July 24, 1905, Ferguson wrote the Hewitt Investment Company:

"You will remember that I have corresponded with you and also had a personal interview with your Mr. Hewitt some time since, in regard to the four claims

that you own in 6-6, but at that time the price that you were asking for this land, was more than our parties would pay. I notice from the plate in my office that you are the owner of quite a little bunch of land in 5-3 and 5-4, Columbia Co., and I would like to know if you would consider a proposition to trade your 4 claims in 6-6 for four claims adjoining the land that you own in Columbia Co., providing of course, that the land was as well timbered with as good a quality of timber. Our information on this subject shows the timber to be about the same in both localities."

Hewitt answered at the foot of the letter, and returned it:

"Your's received on my return. I hardly care to trade lands. I might sell the whole bunch at 20.00 per acre. It is heavily timbered, will average from 6 to 9 M per claim. One claim somewhat burnt."

Again on August 17 Ferguson wrote inquiring whether the Investment Company would consider a proposition for an exchange of lands, and on September 25th as follows:

"Your letter of recent date stating that you would not care to trade your lands but that you would sell them all for twenty dollars per acre, received, but in reply I have to say that there seems to be a very poor prospect of making a sale of this tract at the present time. Timber buying has dropped off, and there is practically no timber changing hands. It may be better after awhile. I am authorized to offer you eight thousand dollars for the four hundred acres in 6-6. As you know one of these claims is partially burned. One of them is better

than the average, and the other two are just about up to the average, in that part of the country, and the price offered you is more than has been paid any one else in the township. The timber is mostly red and bastard fir; practically no yellow fir."

On December 22, 1905, Hewitt wrote the Astoria National Bank:

"Please deliver the enclosed deed of lands in 6-6 West to E. Z. Ferguson for $12,800. net to us in Tacoma funds. We have notified Mr. Ferguson and he will probably call for the deed at an early date."

He also wrote Ferguson as follows:

"We have today sent deed for lands to Astoria N. Bk. which they will deliver to you on payment of $12,800.00

"I will send you a check for commissions when money is received of 2 1-2 per cent. Our directors would not allow more & in fact did not like to deed the land at all. We consider this land worth $30,000. However if you can find us the land you promised, will send my son or another good cruiser to look over lands & in some way make good my promise to you. Now hustle & find the other land. It must be comeatable & good logging chance finally."

By a coincidence Ferguson wrote Hewitt on the same day:

"I have just completed the abstracts for your land, but have not yet given them to the attorney. I have however looked them over myself and find one matter that needs attention. There are four deeds to the Hewitt Investment Co. and each is signed Lester B. Lockwood, Hattie M. Lockwood by Herbert S. Griggs her attorney

in fact, and we do not find any power of attorney of record from Hattie M. Lockwood. It will be necessary to have this or else a deed from Hattie M. Lockwood. Please inform me if you have the P of A, and if so send it with your deed to the Bank; if not, can you get a deed from her? If the attorney finds anything else will let you know, but I do not think there is anything else. Of course you are aware that in Oregon the wife has a dower and her signature is more important than in Washington.

"Up to this time I have been too busy to send you the map of the other lands, but will do so soon. There is quite a little work to make it up.

"When can I expect the deed?"

On December 23rd J. E. Higgins for the bank acknowledged receipt of Hewitt's letter with inclosure.

On January 3, 1906, Ferguson wrote the bank:

"Relating to the deed from the Hewitt Investment Co. to E. Z. Ferguson, the undersigned, said deed being in your possession to be delivered to me upon the payment of $12,800 and purporting to convey the following described land, to-wit: (Description of land), I have to say that the following matters in connection with the title to said land need to be corrected. In the said deed the description reads T. 6 S., whereas it should read T. 6 N., also there is lacking in the title to said land a power of attorney from Hattie M. Lockwood to Herbert S. Griggs, which said power of attorney should be furnished by the Hewitt Investment Co. and placed of record. It also appears that the Hewitt Investment Co. has not complied with the Oregon laws governing foreign cor-

porations. I therefor deposit with you herewith the sum of $12,800.00 in gold coin of the United States, made payable to the said Hewitt Investment Co. with instructions that you shall, when the title to the said land shall have been made perfect in me, deliver to the said Hewitt Invest. Co. the said $12,800 in Tacoma Exchange, and that pending the making of said title perfect in me. you shall hold this money and deed in your possession."

On the same day Ferguson wrote Hewitt Investment Company:

"On Dec. 26th I wrote you in regard to the title of your land which I am purchasing, stating that there was lacking in the title, a power of attorney from Harriet M. Lockwood to Herbert S. Griggs, but up to this time, have no reply. My attorney has examined the abstract in regard to this title, but in addition to the power of attorney which is lacking, he finds two other matters which need attention.

"In the deed, which you sent here, the description reads T. 6 S. instead of T. 6 N., also it does not appear that the Hewitt Investment Company has complied with the Oregon laws governing foreign corporations. I think for your own protection, that you would wish to straighten up this last matter on account of your other land in Oregon.

"I do not know how seriously this affects the title, but think it would be better if it was straightened up. I have today deposited in the Astoria National Bank, the sum of $12800, the sum to be sent you in Tacoma Exchange when the title to this land is made perfect in me. I do this so that you will understand that I am not en-

deavoring to gain time, but am ready and willing to take over the deal whenever it is in shape for delivery."

He also wrote Henry Hewitt, Jr., as follows:

"This morning I wrote to the Hewitt Investment Co., which letter you will undoubtedly receive about the same time that you receive this, and at noon today I received your letter of the 2nd, to which I hasten to reply. I think, in order to get this matter straightened up with the greatest possible speed, it would be best for you to prepare a new deed, making it just the same as the former deed, excepting to state that the land is all in T. 6 N. R. 6 W., W. M., instead of T. 6 S. as it now reads.

"It is evident from the deed in the bank that you have a copy and can see how this mistake occured. This deed you can send to the bank to be substituted for the one that is now in their hands.

"If at the same time, you have an original power of attorney to Mr. Griggs from Harriet M. Lockwood, it could be sent over and recorded in this county; if you haven't the original, you can have a certified copy made from the records there which will answer the same purpose, but before doing this, I would suggest that you examine the power of attorney carefully and see if it conveys sufficient power to enable Mr. Griggs as her attorney to convey land in Oregon, otherwise, it would be of no use and it would be necessary to obtain a deed direct from Mrs. Lockwood. Under the Oregon laws, the wife's interest is absolutely necessary to have. We are very particular in regard to our titles, because we expect to sell this land some day

and do not wish to have any trouble when the time comes.

"In regard to the Hewitt Investment Company's having failed to comply with the Oregon laws governing foreign corporations, we will not let this delay the deal, but will take it for granted that you will straighten it up at your leisure, but would like to know, when you write me, the exact amount of the Company's incorporated capital."

On January 5th the Hewitt Investment Company wrote the bank requesting a return of the deed, as follows:

"The Hewitt Investment Co. or Henry Hewitt, Jr. sent you some time ago deeds to deliver to E. Z. Ferguson on payment of 12800 I think. The deeds it seems are faulty & Mr. Ferguson wants them changed. You will please return them & oblige."

On the same day Hewitt wrote Ferguson:

"Your favor Jan. 3 received. I have written Astoria Nt. Bank to return deeds & as you suggest will make out new deeds. Mr. Griggs has the old Hattie Lockwood deeds signed by him as power of attorney & will send new deed for her to sign. It may take some little time.

"About the commission, the Co. some time ago passed resolutions to only allow 2½ commissions for sales of lands, of which I was not informed, & besides this when I brought the matter up the directors all but myself were against selling & would not have consented at all only to accomodate me. I should have brought the matter up. Of course you

know what any officer promises is only good for his best endeavors to carry out his promise. You are mightly lucky to get the land at all.

"Advise bank to return deeds."

On January 8th Ferguson wrote Hewitt:

"Replying to your favor of the 5th, I have to say that the bank has informed me that they would return the deeds to you by tonight's mail.

"I suppose it will take two or three weeks for you to get them straightened out. In any event, the money will be left at the bank for you as soon as the title is completed.

"Some time this week, I will send you a plat of Columbia County, showing your lands there, as well as the surrounding timber, and statement of what I believe would be possible in adding to your holdings in that locality."

And on January 25th Ferguson again wrote Hewitt:

"If it can be arranged satisfactory to all of us, I would rather pay the money over to you. In case we would pay the $12800 to the Hewitt Investment Company and take its Warranty Deed to the land, would you and the company be willing to give me an agreement and assurance that you would perfect the title, say within a year, or longer, if need be?

"I see no reason why we cannot fix this up without difficulty: the Power of Attorney may turn up, or in any event, Mrs. Strong will get through her honeymoon some time and come home. Do you know when she procured her divorce? It may be that this

would straighten the matter; in any event, it seems to me that if you get the money and we know the title to the land is going to be perfected, that is all that is necessary and we can all sleep the sleep of the just.

"At your rate of interest, the money in the bank is losing nearly $100 a month and I hope we can get it into your hands with the greatest possible speed and would therefor request an early reply."

This comprises practically the whole correspondence found in the record bearing upon the dealings of the parties respecting the land in controversy. Somewhat is said touching the amount of the commission Ferguson was to get for making sale of the land. This is not now a matter of dispute. And much is said respecting other lands looking to some further negotiations, but it does not elucidate the transactions of the parties with reference to the particular land here in controversy.

As will be noted from the correspondence, Ferguson made inquiry of the Hewitt Investment Company looking towards the exchange of certain lands in Columbia County for those in dispute, designated as the claim in 6-6. The exchange of lands was declined, but Hewitt indicated that he might sell "the whole bunch" for $20. per acre, saying the land was heavily timbered and would average from six to nine million feet per acre. Then by Ferguson's letter of September 25th, 1905, he offered $8000. for the "four hundred acres in 6-6." Nothing seems to have come of this offer. The parties talked with each other on occasion,

and finally it was agreed between them, but not by specific note or memorandum in writing, that the defendant company would sell and Ferguson would purchase the 640 acres of land in controversy. Looking to a consummation of the agreement, the defendant sent its deed purporting to be executed and acknowledged in favor of Ferguson to the Astoria National Bank to be delivered to Ferguson on his payment into the bank for the defendant of the sum of $12,800. To this point the contestants are agreed, except that the defendant claims that Ferguson agreed, as part of the same transaction, that he would procure for defendant other lands in Columbia County containing an equal estimate or more of timber, at a price equivalent to 50 cents per thousand feet in the stump. Ferguson denies that any agreement was reached between them touching these other lands. There was much conversation between them, and much was said in the correspondence respecting other lands situated in Columbia County, and lands adjoining lands belonging to the defendant in such county, whereby it appears that Ferguson was endeavoring to find for the defendant lands which the latter desired to purchase if the timber was suitable and the price satisfactory. But the strong preponderance of the evidence is against the conclusion of any definite agreement, either oral or written, as claimed by defendant. It is enough, it seems to me, to set this matter at rest that the parties agreed that the $12,800 consideration for the lands in dispute was to be paid through the bank directly to the defendant company.

No part of this money was to be used by Ferguson for the purchase of other lands, and there was to be no direct exchange of the lands in question for those other lands spoken of. Had it not been for the irregularities found in the title the agreement touching the lands in dispute would have been fully closed and executed by the final passing of the deed through the bank and the payment of the consideration therefor. It is unlikely that the parties would be willing thus to close up the matter in that respect if the dealings as to the other lands were of such importance as is claimed for them. The defendant desired to, no doubt, and would have purchased other lands, as a further investment and Ferguson busied himself to a greater or less extent in endeavoring to find such lands. When found, the timber thereon was to be subject to the cruise of the defendant, and the price depended upon what they could have been purchased for in the market, so I conclude on this subject that, while the parties canvassed the matter respecting the purchase by defendant through Ferguson of other lands, there was no definite agreement arrived at as to this, nor did any agreement of the kind form or constitute a part of the agreement to sell and convey the lands in dispute.

The essential controversy hinges about the contract to convey. The defendant insists that it was verbal only, and, being concerning land, was a nullity; while, on the other hand, it is contended that, considering the correspondence between the parties, together with the deed and the manner of its treatment and disposal, the contract was in writing, or of such a character as to preclude

the application of the statute of frauds. This includes the suggestion that the deed was by agreement of the parties placed with the bank in escrow, to be held by it subject to the payment by Ferguson of the consideration to be accounted for to the defendant.

The Hewitt Investment Company denies that there was any understanding or agreement that such deed should go to the bank in escrow, and claims that the deed was only sent to the bank as the agent of the defendant to carry out its instructions respecting the same.

Ferguson testifies that on a particular trip he made to Tacoma, where Hewitt lived, he and Hewitt, who was acting for the defendant company, agreed upon a deal whereby the defendant would sell the four claims to plaintiff for the consideration of $20. per acre, or the aggregate sum of $12,800, and that Hewitt "would send the deed over to the Astoria National Bank." "He," continued the witness, "told me that he would have the deed executed, and would send it over, and I was to go home, which I did, and pay the money." At the close of his examination he further testifies respecting the same subject:

"Q. Mr. Ferguson, I wish you would explain to the court how it happened that the deed was sent over to the Astoria National Bank by Mr. Hewitt A. Why, I think I requested him to send it to the Astoria National Bank.

Q. What did he say in regard to doing that? A. Why he said that he would have it fixed up; said he would have to have a meeting of the board of directors, and that he would fix it up; and that is when I asked him

about the board of directors, and he told me that he was practically the whole thing; that he and his son owned all the stock. Q. So you suggested to him to send it to the Astoria National Bank, and what were you to do when he sent it to the Astoria National Bank? A. Why of course, I told him the abstracts would have to be made, and if we found the title was all right, we would pay the money. That was the general understanding with things of that kind. (Cross examination): A. Mr. Ferguson, that was just a matter of detail between you and Mr. Hewitt?. A. Yes, Q. But that was not any special matter of agreement at all, was it? A. Well, I suppose it would be just as much an agreement as all our talk was at that time. Q. But did you have any special agreement as to the conditions under which the deed was to be sent to the bank? A. Nothing. I don't think anything special. Q. Or any as to the conditions under which the money was to be paid into the bank by you? A. Well, of course, I don't know—Q. I mean, was there any special agreement at that time on the subject? A. I don't know as there was any special agreement. I don't remember just what was said between us on that subject at that time. Q. Mr. Hewitt was to go ahead and have the deed executed, and send it down? A. Send it over, and we would have an abstract of title made, and when the title was perfected we would pay the money and take the deed. That would be the usual method of procedure. Q. (Redirect) That was the custom, was it? A. Yes."

A deed in escrow is one that has been delivered to a stranger, with directions that he shall deliver to the

grantee upon performance by the latter of some condition, as the payment of a sum of money, or the observance of some obligation, or the happening of some event, the grantor reserving the right to reclaim the deed if the condition is not fulfilled or the event does not happen. Wier v. Ratdorf, 38 N. W. (Neb.) 22, 23; 16 Cyc. 561. And it would seem that it is not essential that the condition upon which the instrument is delivered in escrow be evidenced by writing. It may rest in parol, or it may be partly oral and partly in writing, and may be established by oral testimony. 11 Am. & Eng. Enc. of Law (2 Ed.) 343; Gaston v. City of Portland, 16 Or. 255; Cannon v. Handley, 13 Pac. (California) 315.

But it is not essential here to inquire strictly as to these matters. I have concluded that what was done and what was written relative to the transaction, including the deed that was sent to the bank, constituted a valid contract in writing for the sale of these lands by the defendant to plaintiff Ferguson. The earlier correspondence shows that Ferguson was desirous of making an exchange of lands. All proffers on this basis were declined by the defendant. After some further correspondence and negotiation, the parties agreed verbally upon the sale of four claims at the price of $20 per acre, or $12,800. The deed was executed. It contained a description of the land to be sold, and expressed the consideration, and was in apt form of conveyance by a corporation. Standing alone without delivery, unless deposited as a perfect escrow, it would not be sufficient as a contract to convey, and specific performance could not be predicated upon it. But there is more here, and the parties have practically confirmed in writing what

they agreed to orally. On the same day the deed was sent to the bank, Hewitt, who was acting for defendant, wrote Ferguson "We have today sent deed for lands to Astoria National Bank, which they will deliver to you on payment of $12,800." It would seem from the letter written by Ferguson to Hewitt on the same day, without knowledge that Hewitt had written, that Ferguson had previously had in his possession the abstract of title to the land, for he points out an irregularity in such title. He requests of Hewitt furthermore, if he has in his possession a certain power of attorney, the instrument upon which the irregularity depends, that he send it along with the deed to the bank. On January 3, 1906, Ferguson wrote again to the Hewitt Investment Company stating that his attorney had examined the title and had found two other matters which needed attention. One was that the description of the deed designated the land as in Township 6 South instead of 6 North, as it should be, and the other that the Investment Company had not complied with the Oregon laws governing foreign corporations. It should be said in this connection that the deed described the lands as lying in Clatsop County, Oregon, which cured the defect to which attention was called as to description. The letter also stated that Ferguson had, on that day, deposited in the bank $12,800 to be sent to the defendant when the title was made perfect. On the same day, January 3rd, Ferguson also wrote to Hewitt suggesting that, in order to get the matter straightened up speedily, it would be best for Hewitt to prepare a new deed making it just the same as the former deed, the one in the bank, excepting to state that

the land was in Township 6 North instead of Township 6 South, "as it now reads," and further suggesting, "This deed you can send to the bank to be substituted for the one that is now in their hands." Other suggestions were made relative to the power of attorney, and Ferguson advised Hewitt that he would not let the noncompliance on the part of the company with the Oregon laws "delay the deal." On January 5th the Hewitt Investment Company requested the bank to return the deed. On the same day Hewitt wrote Ferguson that he had written the bank for the return of the deed, and that, as suggested by Ferguson, he would make out a new deed. He also requested Ferguson to advise the bank to return the deed. Ferguson had previously, to-wit, on January 3rd, deposited the $12,800 with the bank, and written it to deliver the said sum in Tacoma Exchange to the Hewitt Investment Company when the title to the land had been made perfect in him, Ferguson, and that, pending the making of said title perfect, it should hold the money and deed in its possession. On January 8th Ferguson wrote Hewitt that he had been informed by the bank that it would return the deeds, and further stated: "I suppose it will take two or three weeks for you to get themstraightened out. In any event, the money will be left at the bank for you as soon as the title is completed."

Now, taking this correspondence together, including the deed and the treatment thereof by the parties, I am of the opinion that it constitutes an agreement in writing in effect such as is required by the statute of frauds respecting sales of land. The deed, while deposited with the bank, was not withdrawn except by the consent of

Ferguson, and when withdrawn it was understood that another would be substituted in its stead, with the corrected description, when the title could be straightened out. The deed, treated as a memorandum, expressed the consideration, described the property to be conveyed, and was subscribed by the party to be charged. This was to be replaced by a new deed with an amendment in the description—an amendment not altogether material to a valid conveyance of the land. The correspondence, aside from the deed, comes near if not quite fulfilling the like requirements of a contract for the sale of lands. But the deed, under the agreement by which it was withdrawn from the bank, must be considered as subsisting, even though in the hands of the Investment Company, until a new deed is produced to take its place. It was not cancelled nor ultimately surrendered. It was allowed to be returned until a new one should be produced to take its place, the money remaining ready at all times to be paid over when the arrangement was consummated. Without else, the contract is valid, and one that a court of equity would require to be specifically performed. In support of this view see Flegel v. Dowling, 54 Or. 40; Alexander v. Vandercook, 39 N. W. (Mich.) 858; Regan v. Howe, 121 Mass. 424.

The irregularity as to compliance with the Oregon laws by the Hewitt Investment Company was waived by the letter which has been noted. As to the power of attorney, Ferguson testifies that he remembers finding one in the records at Tacoma, and that he told Hewitt he would be satisfied with a certified transcript of it, as far as the title was concerned, and requested the deed of

him, but that he has not delivered it nor surrendered the corrected deed. It seems, therefore, that Ferguson did not further insist upon the title being corrected as first requested, and was willing to take the title as it was under the warranty of title, thus relieving the transaction of the objections first made as to the title. No further obstacle remaining, the Hewitt Investment Company should have redelivered the old deed or executed and delivered a new deed to take its place.

I am not favorably impressed with the defense as elucidated by the testimony, that the Investment Company was not authorized to execute the deed. Henry Hewitt, Jr., was in control of the entire businese of the company, and he and his son J. J. Hewitt, and perhaps his wife, were the owners of practically the whole of the capital stock. J. J. Hewitt, the son, was secretary. The by-laws of the company would seem to authorize the president, with the approval of the other members of the finance committee—such committee consisting of the president and two other members of the board of directors—to buy and sell real property without further specific authority from the board. By Article 7 he is made general manager, "with full power to buy real estate—or anything which the company is entitled to hold, buy and sell, subject to the approval of the finance committee;" and by Article 11, it is made the duty of the finance committee "to advise with and approve the purchases and sales made by the president." Evidently Henry Hewitt, Jr., has conducted the business of the company as though he were vested with full power to do the things requisite to the purchase and sale of real property, all in the name of the company, and his conduct in

connection with the transaction now in controversy was in accord with such practice. Under such conditions and practice, the Hewitt Investment Company ought to be and is estopped to deny the authority of Hewitt to enter into the contract or agreement in question to execute with the secretary the deed necessary to convey the title. The plaintiffs are therefore entitled to a decree requiring the defendant Hewitt Investment Company to excute and deliver to Ferguson a deed in form as executed and placed in the bank to the premises in question. The defendant, however, is entitled to the fund deposited in the bank as consideration for the land, and, having paid the taxes on the land since the deed was first executed, should have a decree for the repayment to it by plaintiffs of such taxes, with interest at the rate of six per cent per annum from the time of payment, amounting in the aggregate to $1716.

[Endorsed]: Opinion. Filed Jan. 6, 1913.
A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 3 day of February, 1913, there was duly filed in said Court, a Decree in words and figures as follows, to-wit:

[Decree.]

MINNESOTA AND OREGON LAND AND TIMBER COMPANY, a Corporation, and E. Z. FERGUSON,

Plaintiffs,

vs.

HEWITT INVESTMENT COMPANY,

Defendant.

This cause having come regularly on for trial, the plaintiffs appearing by Mr. C. W. Fulton, their attorney and the defendant appearing by Mr. E. R. York, its attorney, and the court having heard the evidence and the cause having been argued by counsel and due deliberation had thereon,

It is Ordered, Adjudged and Decreed, and the Court by virtue of the power and authority therein vested doth order, adjudge and decree that the defendant execute and deliver to the plaintiff, Minnesota and Oregon Land and Timber Company, a corporation organized and existing under and pursuant to the laws of the State of Minnesota, a good and sufficient deed whereby the said defendant shall grant, bargain, sell and convey to the said Minnesota and Oregon Land and Timber Company, its successors and assigns, the Southeast quarter of the Northeast quarter and the Northeast quarter of the Southeast quarter of Section 10; the Southwest quarter of the Northwest quarter and the Northwest quarter of the Southwest quarter of Section 11; the Southeast quarter of Section 17; the East half of the Northwest quarter and the West half of the Northeast quarter of Section 20 and the Northeast quarter of Section 30, all in Township 6 North of Range 6 West of the Willamette Meridian in Clatsop County, State of Oregon, which deed shall contain covenants whereby the grantor shall covenant to and with the grantee, its successors and assigns, that the grantor is seized in fee simple of the said premises and that the same are free from incumbrances and that the grantor will warrant and defend the title thereto against the lawful claims and de-

mands of all persons whomsoever.

It is further ordered, adjudged and decreed that if the defendant shall fail to execute and deposit with the clerk of this court to be delivered to said Minnesota and Oregon Land and Timber Company a deed as aforesaid, within twenty days from this date, then A. M. Cannon be and he is hereby apointed a commissioner of this court to make, execute and deliver such deed to the said Minnesota and Oregon Land and Timber Company in the name of and as the act and deed of the defendant.

And it appearing to the court that on the institution of this suit in the Circuit Court of the State of Oregon for Clatsop County, that being the court in which this cause was commenced, there was deposited with the clerk of said Circuit Court for Clatsop County, the sum of $12,800.00 to be paid to the said defendant upon the execution of such deed as is hereby decreed to be executed and that by agreement between the parties hereto said sum of $12,800. was deposited in the Astoria National Bank of Astoria, Oregon, and is still on deposit in said bank and certain interest has accrued thereon,

It is Further Ordered, Adjudged and Decreed by the court that upon the execution and delivery of said deed in this court for the Minnesota and Oregon Land and Timber Company, the sum of $12,800.00 together with such interest as has accrued thereon shall be paid over and delivered to the defendant.

The Court further finds that the defendant has paid taxes on the aforesaid premises subsequent to its contract to convey the same to the said plaintiff, in the sum of $1760. and that the defendant is entitled to and

it is hereby decreed to have a lien upon the premises aforesaid to secure to it the payment of said sum of $1760.00 less the plaintiff's costs and disbursements taxed herein.

IT IS FURTHER ORDERED AND DECREED by the court that within five days after the deed aforesaid shall be executed and delivered to the clerk of this court for the said Minnesota and Oregon Land and Timber Company, it, the said Minnesota and Oregon Land and Timber Company shall pay to the clerk of this court for the defendant or file with the clerk of this court the receipt of the said defendant for said sum of $1760.00 less plaintiffs costs and disbursements in this suit herein taxed, or the receipt of its said counsel in this cause for said sum and thereupon the said deed shall be delivered to the said Minnesota and Oregon Land and Timber Company.

IT IS FURTHER ORDERED AND DECREED by the Court that the plaintiffs have and recover of and from the defendant herein their costs and disbursements in this suit, taxed at $108.65.

R. S. BEAN
Judge.

[Endorsed]: Decree Filed Feb. 3, 1913.
A. M. CANNON,
Clerk U. S. Dist. Court.

And afterwards, to wit, on the 28 day of March, 1913, there was duly filed in said court, a condensed statement of evidence in words and figures as follows, to wit:

[Condensed Statement of Evidence.]

In the District Court of the United States for the the District of Oregon.

MINNESOTA AND OREGON LAND AND TIMBER COMPANY and E. Z. FERGUSON,
Plaintiffs,

vs.

HEWITT INVESTMENT COMPANY,
Defendant.

Upon the trial of the case held at Portland, Oregon, on June 3d and 4th, 1912, before Honorable Charles E. Wolverton, District Judge, testimony and other evidence was introduced on behalf of plaintiffs and defendant, and other proceedings were had as follows, to-wit:

The plaintiffs offered in evidence the deposition of Henry Hewitt, Jr., taken pursuant to stipulation, and filed herein.

The defendant objected to the testimony contained in the deposition on the grounds that it is incompetent for the purposes of establishing a valid contract of purchase under the statute of frauds, and as an attempt by this evidence to establish an agreement of sale of land by parol it is incompetent for such purpose.

The Court: I think you can let it be understood that the objections are raised and that the court, without passing upon the objection, takes it under consideration to be determined at the time of the final adjudication. Then each party can file a brief

stating your objections and arguments thereon. The objections may be considered submitted to the court and the court reserves its judgment until the final decision in the case.

The Court: It will be understood on this trial that all rulings are deemed excepted to by the party against whom the ruling is made.

JAMES E. HIGGINS, a witness called on behalf of plaintiffs, testified as follows:

Direct Examination.

I reside in Astoria, Oregon; am cashier of the Astoria National Bank; have occupied that position 20 years or more; was such official and occupied that position in 1905 and 1906. I recall the circumstances of a deed being sent to the bank by the Hewitt Investment Company in December, 1905, for E. Z. Ferguson. This is the letter that accompanied the deed received at the bank on December 23, 1905.

Letter produced, offered in evidence by plaintiffs.

Defendant admits the signature of Henry Hewitt Jr. to the letter, but objects to the letter as incompeent, irrelevant and immaterial as evidence in this cause, and that the letter is not shown to be the letter of the defendant corporation, or written in its name, or signed by any person as an officer of such corporation, but is a personal letter of Henry Hewitt Jr.

The Court: It may be introduced and you can raise that objection hereafter, and its relevancy considered later.

Letter marked "Plaintiff's Exhibit 1," and read in evidence as follows:

"Astoria National Bank,

Astoria, Ore.

Please deliver the enclosed deed of lands in 6-6 West to E. Z. Ferguson for $12,800.00 net to us in Tacoma funds. We have notified Mr. Ferguson and he will propably call for the deed at an early date.

Yours truly,

12-22-1905. HENRY HEWITT, JR."

I received the deed referred to in that letter at the time, in the letter. Mr. Ferguson requsted the deed with a draft covering the amount, $12,800.00, to be sent to Portland for payment. The money was paid in on the 27 day of December, $12,800.00. I recognize the signature to the letter now handed us, signed by E. Z. Ferguson, dated January 3, 1906, addressed to Astoria National Bank; I received that letter on January 3, 1906, and acknowledged receipt of it on same day. I am acquainted with Mr. Ferguson's hand writing and that is his signature. The letter came from him to me. The signature appended to the letter is my signature.

Plaintiffs offered letter in evidence.

Defendant objects to the letter as being incompetent, irrelevant and immaterial as evidence of any matter in issue in this cause and as not establishing a valid contract for the sale of the land.

The Court: The letter will be admitted, with the reservation of the court's final determination as to

its competence when the case is submitted.

Marked "Plaintiff's Exhibit 2," and read in evidence as follows:

"Astoria, Oregon., Jan. 3, 1906.

Astoria National Bank,

Astoria, Oregon.

Gentlemen:

Relating to the deed from the Hewitt Investment Co. to E. Z. Ferguson, the undersigned, said deed being in your possession to be delivered to me upon the payment of $12,800 and purporting to convey the following described land, to-wit: The S. E. ¼ of N. E. ¼ of sec. 10, the N. E. ¼ of the S. E. ¼ of Sec. 10; the S. W. ¼ of the N. W. ¼ and the N. W. ¼ of the S. W. ¼ of sec. 11; the S. E. ¼ of Sec. 17; the W. ½ of N. E. ¼; the E. ½ of N. W. ¼ of sec. 20, and the N. E. ¼ of Sec. 30, all in T. 6, N. R. 6 W., I have to say that the following matters in connection with the title to said land need to be corrected. In the said deed the description reads T. 6. s., whereas, it should read T. 6. N., also there is lacking in the title to said land a power of attorney from Hattie M. Lockwood to Herbert S. Griggs, which said power of attorney should be furnished by the Hewitt Investment Co. and placed of record. It also appears that the Hewitt Invest. Co. has not complied with the Oregon laws governing foreign corporations. I therefore, deposit with you herewith, the sum of $12,800.00 in gold coin of the United States, made payable to the said Hewitt

Investment Co. with instructions that you shall, when the title to the said land shall have been made perfect in me, deliver to the said Hewitt Invest. Co. the said $12,800 in Tacoma Exchange, and that pending the making of said title perfect in me, you shall hold this money and deed in your possession.

Yours truly,

(Duplicate) E. Z. FERGUSON.

We hereby acknowledge to have received the said above $12,800 deposited in accordance with the above instructions. Dated this 3d day of Jan.

J. E. HIGGINS, Cashier."

The letter now handed me purporting to be signed in the name of the Hewitt Investment Company by Henry Hewitt Jr., bearing date January 5, 1906, was received by me probably the next day or two days after January 5, 1906, the exact date I can not tell. I am not familiar with the signature of Henry Hewitt.

Plaintiffs offered the letter in evidence.

The defendant admits the signature to the letter to be the signature of Henry Hewitt Jr., and that he was then the president of defendant corporation, but objects to the letter on the same grounds as to the former letter offered in evidence.

The Court: Very well. The court will make the same ruling.

Marked "Plaintiff's Exhibit 3," and read in evidence as follows:

"Tacoma, Jan. 5th, 1906.

"Astoria Nat. Bank,

Gentlemen:

The Hewitt Investment Co. or Henry Hewitt, Jr., sent you some time ago Deeds to deliver to E. Z. Ferguson on payment of 12800. I think the deeds its seems are faulty & Mr. Ferguson wants them changed you will please return them & oblige

Yours truly,

HEWITT INVESTMENT CO.

By Henry Hewitt, Jr., Pt."

When that letter was received the deed was returned in reply to that letter on the 9 day of January, 1906; it was returned to the Hewitt Investment Company in compliance with that letter on January 9th, 1906. I know it was transmtted on that date to the Hewitt Investment Company, Tacoma, from the records I have before me.

The plaintiff offered to read a copy of the letter in evidence.

The defendant objected to the letter, not on the ground that it is a copy, but on the same grounds as stated to the proceeding letters.

The Court: Very well. It will be the same ruling.

I know that letter was sent to the Hewitt Investment Company by mail, postage prepaid.

The letter referred to was read in evidence as follows:

"Astoria, Oregon, January 9, 1906. Messrs. The Hewitt Investment Company, Tacoma, Washington.

Dear Sirs:—Referring to yours of December 22, 1905, we herewith return for correction the deed mentioned therein, at the request of Mr. E. Z. Ferguson, grantee named in said deed. We beg to state that on the 3rd inst. Mr. Ferguson deposited in this bank the sum of $12,800 to be paid to you in Tacoma Exchange when the title to the property purporting to be conveyed in said deed should be perfected in him, and we hold the same subject to above conditions."

The deed was never returned to me or to our bank.

Cross-examination.

The $12,000 mentioned in the letter read in evidence was deposited in our bank in money or a bank draft; my recollection is that a draft was made on some bank here in Portland and the money was placed on deposit with the First National Bank here, our correspondent, to the credit of our bank; that is the draft that was sent through was paid and the money deposited with the First National Bank, and I held the deed after it had been sent to me by Mr. Hewitt subject to the conditions stated in my letter. The postal card dated December 23, 1905, called to my attention, is an acknowledgment of the receipt of the letter of December 22, and the deed; the postal card was issued by me or our bank on receipt of the deed and I held the deed as stated in the card.

Postal card marked for identification "Defendant's Identification A."

This letter called to my attention bears my signature as cashier of the bank. It was written by me

and I have a copy of it here.

The letter referred to is marked "Defendant's Ident. B."

This money which was paid into the bank was not paid over to Mr. Hewitt or to the Hewitt Investment Company that I know of; the bank continued to hold the money subject to compliance with the conditions stated in the letters, but the bank is not holding the money now. The money was not paid to Mr. Hewitt or to the Hewitt Investment Company to my knowledge.

Mr. FULTON.—We have not contended it was ever paid over. It was ready to be paid. We bring it into court. We claim we have it in court now, ready to be paid yet.

COURT.—Did you say it had been brought into court?

Mr. FULTON.—It has been brought into court, yes, your Honor.

COURT.—You claim, I presume, that the escrow and deposit of the money constituted a contract?

Mr. FULTON.—Yes, which can be specifically enforced.

Mr. YORK.—That is where we differ, if the court please.

Mr. FULTON.—That is, that together with the correspondence of the parties also, showing the conditions.

Mr. YORK.—The defendant contends that there was no escrow; that is, that it did not constitute an escrow.

There was a subsequent deposit of the money in the state court when the plaintiff brought this suit and Mr. Cannon now has that certificate of deposit for some twelve thousand nine hundred odd dollars, which is in our bank.

Mr. FULTON.—If there is any question about that being a genuine certificate, that was deposited by the clerk of the State Court with this bank, why, I would want to identify it. If not, I won't take the time.

The COURT.—I supose there would be no question about that certificate?

Mr. YORK.—No. What I was going to say is merely this: I have never seen such a certificate, but I might state there was a stipulation that the money paid into the Astoria Bank might be withdrawn and placed in a certificate of deposit which would bear interest, without prejudce to the rights of any party to this suit.

COURT.—In the same bank?

Mr. YORK.—I am not sure about the bank.

Mr. FULTON.—Well, it is in this bank, anyway. The only reason I called attention to it was, if it became necessary to prove we had that money in court, to prove that this certificate is money.

COURT. Yes, very well.

Witness excused.

Mr. FULTON.—This check was sent up here, and in view of the fact that it was drawing interest in this bank where it now is, by stipulation between the parties, which I could not find of record, but which I

had been told had been made on the side, I asked Mr. Cannon not to withdraw it from that bank there where it would be drawing interest. He said that in that case it could not go into the registry of the court; if it went into the registry of the court that he would have to deposit it with the depositary required by the court, which I have no doubt is true. It was only a few days ago that it came up, and I told him that I would take the matter up, and see if we could not agree that it might remain, so far as we are concerned, in the Astoria National Bank, so that it will continue to draw interest. If there is any objection to that, why, of course, I will have Mr. Cannon cash it, and pay it over here, but if this case continues longer, I think it will be to the interest of both parties to have the money drawing interest, and we might sign a stipulation later on so as to release Mr. Cannon. There would be no objection to that, would there, your Honor?

COURT.—No, I think not.

EDWARD Z. FERGUSON, a witness called on behalf of the Plaintiffs, testified as follows:

Direct examination.

I am one of the plaintiffs in this suit. I reside in Portland, Oregon. Am engaged in real estate and dealing in timber lands on my own account and as agent for others. I had some negotiations with the Hewitt Investment Company respecting the purchase of the lands described in the amended complaint in this suit; those negotiations were with Henry Hewitt, Jr.

Q. Now, in the purchase of those lands, in negotiating for them, for whom were you acting, as a matter of fact?

Mr. YORK.—I think I will object to that, if the court please, unless it is shown that if he was acting on behalf of other parties such a disclosure was made to the defendant. It is on the ground, that it is settled in the pleadings that the defendant here had no negotiations with the plaintiff corporation, and never entered into any contract or contractual relations with it, and knew nothing of the plaintiff corporation until this suit was brought; and I think that there is a material question here.

Mr. FULTON.—The suit is in the name of both himself and this company; but my impression is, my understanding of the law is, that while an agent may deal in his own name, he has a right to disclose his principal and take advantage of it, and, of course, the contract in his own name.

The COURT.—The evidence can go in over the objections, and I will settle that in the case.

A. For the Minnesota and Oregon Land and Timber Company, the co-plaintiff in this suit. I heard the testimony of Mr. Higgins about the payment of the $12,800 in that bank. The money was provided by the Minnesota and Oregon Land and Timber Company. I recognize the letter shown me, bearing date July 24, 1905, dated Astoria, Oregon, addressed to the Hewitt Investment Company, at Tacoma, Washington, signed by me, with answer appended, purporting to be signed by Henry Hewitt Jr.; the letter was

written by me to the Hewitt Investment Company on July 24, 1905, and was sent to the Hewitt Investment Company. There is an answer from Mr. Hewitt on the bottom of it. I know Mr. Hewitt's handwriting and this is his answer on the bottom of the letter in his hand writing.

Plaintiff offered the letter in evidence.

Mr. York.—We object to it on the ground that it is incompetent for the purpose of establishing any contract for the sale of these lands, and we object to the notation at the bottom, a purported answer to the letter signed by Henry Hewitt, on the ground that it is not an answer of the corporation to whom the letter was addressed.

COURT.—Very well. The same ruling will be made in this case as in the other cases.

Marked "Plaintiffs' Exhibit 4," and read in evidence as follows:

"Astoria, Oregon, July 24, 1905.

The Hewitt Investment Co.

Tacoma, Wash.

Dear Sirs:—

You will remember that I have corresponded with you and also had a personal interview with your Mr. Hewitt some time since, in regard to the four claims that you own in 6-6, but at that time the price that you were asking for this land was more than our parties would pay. I notice from the plats in my office that you are the owner of quite a little bunch of land in 5-3 and 5-4, Columbia Co., and I would like to know if you would con-

sider a proposition to trade your four claims in 6-6 for four claims adjoining the land that you own in Columbia Co., providing of course, that the land was as well timbered with as good a quality of timber. Our information on this subject shows the timber to be about the same in both localities.

Hoping you will favor me with an early reply on this subject,

Yours truly,

E. Z. FERGUSON,"

Following this letter, and in longhand, is the following:

"Yours received on my return. I hardly care to trade lands. I might sell the whole bunch at 20.00 per acre. It is heavily timbered, will average from 6 to 9 M per claim. One claim somewhat burnt.

Yours, HENRY HEWITT, Jr."

"Excuse delay."

The land referred to in 6-6 is the four claims that are involved in this suit, described in the amended complaint. The statement in the letter that the land will average 6 to 9 M per claim means 6 to 9 million per claim.

Q. Now, when did these negotiations commence, Mr. Ferguson? Just tell how they commenced, and give a history of it.

Mr. YORK: I think at this time, if the court please, I want to objeect to any and all testimony by way of oral evidence which may be offered for the purpose of establishing a contract for the sale of the lands involved in this suit, upon the ground that any such testimony is incompetent for the purpose of proving or estab-

lishing a contract for the sale of lands under the statute. And I make this objection at this time as a general objection, if the court will so consider it, to avoid making the objection from time to time. The court will understand that I make it as a general objection to all testimony of this character.

Mr. FULTON: I am willing it should be so understood.

COURT: Very well. The court will take it under advisement, as far as ruling on the objection is concerned. I suppose you want to show this testimony for the purpose of connecting up this correspondence?

Mr. FULTON: Yes, sir. The statute, of course, requires some note or memorandum to be made in writing expressing the consideration and describing the property. We claim we have all that, but we must connect it by the testimony.

The COURT: I understand the points made by both parties. I will allow the testimony to be received.

Q. Just proceed, Mr. Ferguson, and tell your story of these negotiations—what you did.

I don't know just when my first negotiations with Mr. Hewitt began about this land, but it was prior to this date of July, 1905 that I had more or less negotiations about purchasing the land. We were purchasing for the parties who afterwards formed the Minnesota and Oregon Land and Timber Company, this tract in 6-6, and were trying to purchase everything in there. Mr. Hewitt had four claims in there,, or Hewitt Investment Company had four claims in there, and naturally we tried to get those along with the others. In the

course of time, why, we got practically all that we could get or cared to get, with the exception of Mr. Hewitt's four claims. And negotiations had proceeded along—I made a trip or two to Tacoma, and at this particular trip that I made over there, why, we agreed on a deal. The price for the lands was $20 per acre for which they were offered by Mr. Hewitt, acting as I understood for the Hewitt Investment Company. He claimed to be the Hewitt Investment Company, virtually. I agreed to pay the $20.00 per acre. I told Mr. Hewitt at the time that $20 per acre was more than we had paid anybody else in that locality for lands; it was a higher price than we had paid any one else per acre for that land; and I told him that he could take that money and buy other lands in other localities for less money; that we were willing to pay a little more for his land because it filled out our bunch, and completed what we had, and made it more solid, and we wanted it particularly. Mr. Hewitt didn't seem particularly anxious to sell, but, after talking it over and arguing the point with him, and telling him I thought that he could take the money and do better elsewhere with it, anyhow, why, we agreed—that he would take the $12,800, $20 an acre, for the four claims, and would send the deed over to the Astoria National Bank. He told me that he would have the deed executed, and would send it over, and I was to go home, which I did, and pay the money. That was about all the main points of the transaction. (It was here admitted by both parties that the commission of 2 ½ per cent referred to in the evidence had been eliminated from the case by agree-

ment of the parties".) This conversation I had with Henry Hewitt Jr., personally at his office at Tacoma. His son was present part of the time. Pursuant to that conversation Mr. Hewitt sent the deed over to the Astoria National Bank to be delivered to me upon the payment of the $12,800 as agreed. I saw the deed when it arrived and that is the deed concerning which Mr. Higgins testified to having received. I read the deed and am familiar with deeds. For something over 20 instruments of that kind. The deed was a deed from the Hewitt Investment Company, properly executed ,with covenants of general warranty and was all regular and properly executed by the Hewitt Investment Company under the seal of the corporation, signed by the president and secretary. The deed was to E. Z. Ferguson, grantee, and the land described in the deed was the Southeast quarter of the Northeast quarter and the Northeast quarter of the Southeast quarter of section 10, the Southwest quarter of the Northwest quarter and the Northwest quarter of the Southwest quarter of section 11, the Southeast quarter of section 17, the East half of the Northwest quarter and the West half of the Northeast quarter of section 20, and the northeast quarter of section 30, all in township 6 south, range 6 west of the Willamette Meridian, all in Clatsop County, Oregon. That description reading township south is not correct; it was not what the deed should be. The land negotiated for was Township 6, north of range 6 west, instead of township 6 south; there is no township south in Clatsop County. All lands in Clatsop County are in some township north and some range west. Our attor-

ney discovered the error in the deed, otherwise the deed was in due form. It contained a certificate of acknowledgment and was properly acknowledged. I think I wrote Mr. Hewitt calling his attention to the error. The letter handed me, dated January 3d, 1906, to the Hewitt Investment Company was written by me and was forwarded by United States mail to the Hewitt Investment Company on that date. (Defendant admitted having the original and agreed that the copy might be used.)

Plaintiff offered the letter in evidence.

Defendant objected to the admission of the letter on the same grounds as to the other letters as being incompetent for the purpose of establishing a valid contract of sale.

The COURT: Very well. The same ruling will be made.

Marked "Plaintiffs' Exhibit 5," and read in evidence as follows:

PLAINTIFFS' EXHIBIT 5.

"Astoria, Ore. Jan. 3, 1906.

Hewitt Investment Co.,
Tacoma, Washington.

Gentlemen:

On Dec. 26th I wrote you in regard to the title of your land which I am purchasing, stating that there was lacking in the title, a power of attorney from Harriet M. Lockwood, to Herbert S. Griggs, but up to this time, have no reply. My attorney has examined the abstract in regard to this title, but in addition to the power of attorney which is lacking, he finds two other matters which need attention.

In the deed, which you sent here, the description reads T. 6 S. instead of T. 6 N., also it does not appear that the Hewitt Investment Company has complied with the Oregon laws governing foreign corporations. I think for your own protection, that you would wish to straighten up this last matter on account of your other land in Oregon.

I do not know how seriously this affects the title, but think it would be better if it was straightened up. I have today deposited in the Astoria National Bank, the sum of $12800, the sum to be sent to you in Tacoma Exchange when the title to this land is made perfect in me. I do this so that you will understand that I am not endeavoring to gain time, but am ready and willing to take over the deal whenever it is in shape for delivery.

In regard to the commission of 2 1-2 per cent, as mentioned in your letter, I think it was thoroughly understood between myself and Mr. Henry Hewitt that I was to have the 5 per cent, and I think of course, that I should have it, but if the Company absolutely refuses to allow more than 2 1-2 per cent, I will, of course, take the lands anyway. You can inform Mr. Hewitt that I will probably send him today or tomorrow maps and data regarding the other timber proposition that I talked with him about. I think that one of them, at least, will appeal to him. Trusting you will favor me with an early reply,

Yours truly,

E. Z. FERGUSON."

Mr. FULTON: Now, in connection with that letter last read, and the correspondence preceding it, I want

to read into the record, your Honor, two letters written by Mr. Hewitt to Mr. Ferguson, which are attached to the deposition of Mr. Hewitt and by him identified as his letters, but I would like to have them in the record in this order.

COURT: Very well. I suppose you want the same objection to that?

Mr. YORK: Same objection, if the Court please.

COURT: Very well. Same ruling.

Mr. FULTON: I am reading Plaintiffs' Exhibit "B" attached to the deposition of Henry Hewitt, taken by the plaintiffs. The letter heading is "Hewitt Land Company, Tacoma, Wash."

"Tacoma, Dec. 22, 1905.

E. Z. Ferguson,

Dear Sir:—We have today sent deed for lands to Astoria N. Bk. which they will deliver to you on payment of 12800.00. I will send you a check for commissions when money is received of 2 1-2 per cent. Our directors would not allow more, & in fact did not like to deed the land at all. We consider this land worth 30,000. However, if you can find us the land you promised, will send my son or another good cruiser to look over lands & in some way make good my promise to you. Now hustle & find the other land. It must be comatable and good logging chance finally.

Yours, HENRY HEWITT, Jr."

And I will read Plaintiffs' Exhibit "A" attached to the same deposition. Heading of the letter:

"Hewitt Land Company
Tacoma, Wash."

"Tacoma, Jan. 5th, 1906.

"E. Z. Ferguson,

Dear Sir:—Your favor of Jan. 3 received. I have written Astoria Nat. Bank to return deeds & as you suggest will make out new deeds. Mr. Griggs has the old Hattie Lockwood deeds signed by him as power of attorney & will send new deed for her to sign. It may take some little time.

"About the commission, the Co. some time ago passed resolutions to only allow 2 1-2 commissions for sales of lands, of which I was not informed, & besides this when I brought the matter up the directors all but myself were against selling & would not have consented at all only to accommodate me. I should have brought the matter up. Of course you know what any officer promises is only good for his best endeavors to carry out his promise. You are mighty lucky to get the land at all.

"Now about the Oregon Populistic Law, we think its absolutely unconstitutional & this land was deeded to Hewitt Investment Co. before this law came into effect & we have done no business since. In fact I did not know of the law or its provisions. I intend to convey other lands to H. Hewitt, Jr. & do no more business in Hewitt Investment Co. Will that do or do you advise me to comply now with the law? The Co. is incorporated for $50,000—$37,000 paid in & its lands mostly in Washington. How much & to whom should this be paid to. I suppose its a state law.

"Now about those lands you send me descriptions. The Red & Black look good providing the mill gets rates to Eastern points same as Portland. Do the Oregon Short Lines assume this extra rates. If Hammond owns this road evidently he has already bottled up this poor mill Co. You say timber can be bought for 30c, he charges them $2.00, how is this and what will he do to us if we buy that other timber & will he not also bottle us up? What is the quality of timber. Is it old growth yellow fir & high land spruce & how large and what proportion spruce, is there any cedar &c. & how abt. quality? How much hemlock & what will that cost, if anything, & dont you know of something better that we should have a fair chance to succeed if we operate in competition with Portland?

"Yours, HENRY HEWITT, Jr."

Down below the signature are these words:

"Advise bank to return deeds, Hewitt."

The letter dated January 3, 1906, addressed to Henry Hewitt, Esq., Tacoma, Washington, was written by me to Mr. Hewitt, personally on January 3, 1906.

Plaintiff offered the letter in evidence.

Defendant objected to the admission of the letter on the same grounds as heretofore stated.

Letter marked "Plaintiffs' Exhibit 6," and read in evidence as follows:

Jan. 3, 1906.

Henry Hewitt, Esq.,
Tacoma, Washington.

Dear Sir:—

This morning I wrote to the Hewitt Investment Co., which letter you will undoubtedly receive about the

same time that you receive this, and at noon today, I received your letter of the 2nd, to which I hasten to reply. I think, in order to get this matter straightened up with the greatest possible speed, it would be best for you to prepare a new deed making it just the same as the former deed, excepting to state that the land is all in T. 6 N. R. 6 W., W. M., instead of T. 6 S. as it now reads.

It is evident from the deed in the bank that you have a copy and can see how this mistake occurred. This deed you can send to the bank to be substituted for the one that is now in their hands.

If, at the same time, you have an original power of attorney to Mr. Griggs from Harriet M. Lockwood, it could be sent over and recorded in this county. If you haven't the original, you can have a certified copy made from the records there which will answer the same purpose, but before doing this, I would suggest that you examine the power of attorney carefully and see if it conveys sufficient power to enable Mr. Griggs as her attorney to convey land in Oregon, otherwise, it would be of no use and it would be necessary to obtain a deed direct from Mrs. Lockwood. Under the Oregon laws, the wife's interest is absolutely necessary to have. We are very particular in regard to our titles, because we expect to sell this land some day and do not wish to have any trouble when the time comes.

In regard to the Hewitt Investment Company's having failed to comply with the Oregon laws governing foreign corporations, we will not let this delay the deal, but will take it for granted that you will straighten it up

at your leisure, but would like to know, when you write me the exact amount of the Company's incorporated capital.

Thinking it possible that you may not be fully informed as to the Oregon laws, I inclose you herewith some circular matter that I have received from the Secretary of State as I happen to have a surplus of them on hand.

Trusting that you will find the power of attorney all O. K.,

Yours truly, (Signed) E. Z. FERGUSON.

P. S. In regard to the commission of 2 1-2 per cent instead of 5 per cent as you agreed, I hardly think that you should cut me off from this, as it was thoroughly understood between us, and I believe that after you have considered the matter fully, that you will persuade the Company to allow it. However, in any event, we want the land whether the company will allow us 5 per cent or not. I am inclosing you under separate cover, one of the propositions that I talked about when I was in your office.

E. Z. F.

The letter handed me, dated January 8, 1906, addressed to Henry Hewitt, Jr., was signed by me and sent by me to Mr. Hewitt on that date.

Plaintiff offered the letter in evidence.

Defendant objected to the admission of the letter upon the same grounds as heretofore stated.

The COURT: Very well. Same ruling.

Marked "Plaintiffs' Exhibit 7," and read in evidence as follows:

"Astoria, Ore. Jan. 8th, 1906.

Henry Hewitt, Jr.

Tacoma, Washington.

Dear Sir:

Replying to your favor of the 5th, I have to say that the bank has informed me that they would return the deeds to you by tonight's mail.

"I suppose it will take two or three weeks for you to get them straightened out. In any event, the money will be left at the bank for you as soon as the title is completed.

In regard to the commission, we will let it go as you say, at 2 1-2 per cent. As to the matter of the state tax against corporations, I think that you had better write to Hon. F. I. Dunbar, Secretary of State, for a statement as to the present standing of the corporation. I have had no experience with foreign corporations, and do not know just as to how the matter will stand. I am under the impression, however, that he will advise you that you are liable for the tax for the past three years, and under the circumstances, will allow you to pay this amount without forcing a fine, and I think there is some provision whereby you can withdraw from doing business in the state if you so desire.

About a year ago, I noticed something in the Oregonian where a suit had been started to test the validity of the law, but have heard nothing from it since, and the attorneys that I have spoken to here, do not seem to know of any decision in the matter.

The Secretary of State will probably give you all the information that you desire.

As to the land in 5-9, in connection with the Seaside Mill Co. I have to say that the statement that you make is undoubtedly true, and that Hammond has this mill bottled up to the extent that they must depend upon him almost entirely for future timber. This was the very reason why I thought that it would be a good thing for some other party to own this timber in 5-9 as they would be in a position to compete with Hammond in selling this mill its timber. You, of course, are much better informed in a matter of this kind than I am, and it might be that it would not work out in the way that I think, yet I believe that it could be sold either to the mill or to the Hammond people later on, at a good profit. I have no cruise upon the land, but think it is a very fair bunch from what I have heard of it. I have for sale, however, a tract of 5000 acres at $17 per acre. This is on the Nehalem slope about 6 miles further down the river than the lands that we have just purchased from you. If you think you would care to consider that, I will send you a plat of it, the estimates, and conditions.

Some time this week, I will send you a plat of Columbia County, showing your lands there, as well as the surrounding timber, and statement of what I believe would be possible in adding to your holdings in that locality.

Yours truly,

(Signed) E. Z. FERGUSON.

I informed Mr. Hewitt that the Minnesota & Oregon Land & Timber Company was purchasing the land; I told him that I was a stock holder in the company, but

was buying the lands for the company. I saw Mr. Hewitt after the deed was sent back for correction. I think I wrote him in regard to it and I know went to Tacoma and saw him about it about that time. I remember of going to the records in Tacoma and finding a power of attorney from Lockwood to Griggs which was required to straighten out the title and concluded that by having a certified copy made it would help straighten that out. I told Mr. Hewitt of that and that we would be satisfied so far as the title was concerned with that power of attorney. I remember of talking with him about getting the deed again or having him execute a new deed and he took the stand that they didn't care about selling the land or letting it go; that was the general tenor of the conversation, but I could not state definitely just what was said. I requested the deed of him. That was some time before we brought this suit. He did not redeliver the deed or surrender the corrected deed.

Cross Examination.

I had conversations with Mr. Hewitt at Tacoma two or three times. I was over there two or three times, anyhow, and the matter of the transaction in regard to this land was discussed by me with Mr. Hewitt at that time. Mr. Hewitt did not then state that he desired to procure the title to the other lands referred to by way of trade but the matter was this way: I was presenting the matter to Mr. Hewitt and endeavoring to convince him that he could take this same money and buy other timber just as good and just as well located for less money. We needed these lands because they were in our particular bunch and I was willing to pay more for

them than we had been paying any one else. Mr. Hewitt stated that he or the Hewitt Land Company had other lands up there and I knew of four or five claims which had been presented to me as being purchaseable at a price which was considerable less than what we were offering him. I made that statement to Mr. Hewitt and told him about that land. I told him he could take this money and go up there and purchase those other claims which would be nearer his own holdings and Benson's logging road was building right in there and it would be better land for him if he could purchase it for less money. I probably represented to him that those lands had been offered to me for these prices; I had no option on them; I think I represented to him that I thought I could get them for him; not that I positively could but I think I told him that I thought I could.

Q. Didn't he state he desired to obtain those other lands because they lay adjacent to lands which he or one of his companies then held?

A. Well, he didn't state positively that he would take them; he stated that he might purchase them; he would want to cruise them; he would want to see what they were and know whether they were good lands or not. It was not understood by me that the proceeds to be received on the conveyance of the lands covered by the deed were to go into the purchase of the other lands. I had no authority to take that money and put it in there. I understood it was his intention to take this money and buy other lands with it, and possibly these lands that I was speaking about.

Q. And didn't you represent to him that you could

procure those lands for him?

A. No, sir, not positively. I had no option on them. I told him what they had been quoted to me, the prices they had been quoted to me, and I think I told him who by, and the circumstances; but I had no option on them; I had no way of saying I would deliver them because I had no positive assurance that I could. I think I agreed with him to furnish him a map showing the location of those lands. I think I did furnish him such a map. I am not positive about that but I think I sent him a map showing the lands. I did not subsequently get those lands for him. He didn't request me to go ahead and get those lands. He wrote over asking how about those lands, or something of that kind, in his correspondence. I didn't know whether he would take them or not. I understood that he would expect that I would see what I could do in regard to them and whether I could get them for him.

Q. To carry out that intention you did endeavor to get those lands for him?

A. Why, I didn't because we didn't close this other deal. If he had sent the deed back and we had closed this deal I would have gone on and tried to get those lands for him, but after he refused to send this deed back, the whole thing was up.

Q. After this deed had been returned to Tacoma, and you requested that it be corrected and sent back to Astoria, did not Mr. Hewitt then decline to do it because you either failed or refused to get the other lands for him?

A. Oh, he may have used that as an excuse for not

sending the deed back, but there wasn't any bargain or trade whereby I was to furnish the other deeds as a part of the consideration of those lands. These lands were bought for straight $20 an acre.

Q. Did not he state to you that that was the reason he declined to return the deed to Astoria?

A. I think he did; after he got the deed back I think he used that as one of the reasons why he would not return the deed. I talked with Mr. Hewitt in Tacoma when I went up there, subsequently, and found the power of attorney was of record. I think that was while the deed was still in the bank at Astoria that I went to Tacoma and found this power of attorney, but I am not absolutely positive about that. It may have been after the deed was returned. The deed was a general warranty deed and contained just the covenants of a general warranty deed.

Redirect Examination.

This talk about my looking up other lands for him was not a part of the consideration for the purchase of the lands in question. It was made no condition in regard to the purchase of the lands in question. This suit was commenced in the State Court in Clatsop County. At the time I commenced the suit I deposited the purchase money in court with the complaint. I think we withdrew the money from the bank to make the deposit.

Recross Examination.

At the time I withdrew the money from the bank I didn't ask or obtain any consent of Mr. Hewitt to such withdrawal. I considered the money was there sub-

ject to my order and I had a right to withdraw it without obtaining any consent of Mr. Hewitt. That was after he had refused to send back the deed, and when I had to bring suit to get the deed.

Plaintiff offered in evidence the certificate of the Secretary of State regarding compliance with the Oregon laws by the plaintiff corporation.

Marked "Plaintiffs' Exhibit 8."

Plaintiff offered in evidence the receipt of the state Treasurer for the taxes for the current fiscal year on the corporation.

Marked "Plaintiffs' Exhibit 9."

It was considered admitted that the plaintiff is a corporation and had authority to purchase the land, and that $12,800 was deposited by plaintiffs in court as a tender at commencement of this suit.

Plaintiff Rests.

The defendant thereupon moved for a judgment of non-suit and for the dismissal of the case upon the ground that there was not sufficient evidence upon which the plaintiff was entitled to have the relief sought by the amended complaint.

After argument the court overruled the motion at this time upon the understanding that it would be given full consideration on the final hearing.

Motion for non-suit denied and exception allowed defendant.

Defendant's Evidence.

HENRY HEWITT Jr., witness called on behalf of defendant, testified as follows:

Direct Examination.

I reside at Tacoma, Washington and am acquainted with Mr. Ferguson, the witness who preceded me. I had some negotiations with Mr. Ferguson in regard to the sale of certain lands belonging to the Hewitt Investment Company in this state in 1905 and 1906; I had personally agreement and talk with Mr. Ferguson. He brought the matter up by writing to me to buy these lands; that was before we ever made any deal. I wrote him personally that the lands were not for sale but thought if he would buy the whole bunch, that is all the lands, I would sell them for $20 an acre. I mean these particular lands that are in litigation and the balance of the lands that I owned on the Nehalem River. The lands on the Nehalem River and all those lands were all of them owned by the Hewitt Investment Company. I am interested in another corporation called the Hewitt Land Company but that is an entirely separate corporation. He wrote back and made me an offer for those particular four quarter sections of $8,000. (The plaintiff thereupon demanded that the witness produce the letter referred to and objected to oral testimony of its contents but the witness did not produce the letter claiming that he had not been able to find it.) That was some time before this deal and that is what brought it up. He wrote back and offered $8,000 and I refused it and that ended there. The letter brought to my attention signed E. Z. Ferguson, dated August 17, 1905, was received by me through the mail.

It was admitted that the letter was signed by E. Z. Ferguson.

Letter offered in evidence, marked "Defendant's Exhibit C," and read as follows:

"Astoria, Oregon, August 17, 1905.

"Hewitt Investment Co.

Tacoma, Wash.

Gentlemen:

I wrote you some time ago regarding a trade of lands by exchanging your four quarters in T. 6 N. R. 6 W. for a like amount of land adjoining your holdings in Columbia County, but have had no reply.

"Please let me know if you will consider a proposition of this kind and oblige,

Yours truly,

E. Z. FERGUSON."

That letter was received by me as leading up to the transaction. He offered me $8,000 by letter but no transaction was closed or agreed upon at that time. The agreement under which the deed alleged in the amended complaint was executed was made a very short time before we made the deed. I think it was in the month of December, 1905. All prior negotiations up to that time had been closed. Mr. Ferguson came personally and convinced me that it would be a good thing for me to let him have these lands and he would buy me those other lands from 25 to 30 cents a thousand. That was when I told him that I would endeavor to get this deed from our company in consideration of his getting me those other lands; that was a verbal conversation between me and Mr. Ferguson at Tacoma. The prior negotiations had ended and the matter was brought up again then in December. He induced me it was a good

trade, which I considered it was, to make the exchange. I told him I didn't have the money but I would sell these lands at the price he made providing we could get the other lands.

Q. State whether or not he definitely agreed that he could or would get the other lands to deliver to your company.

A. Why, he told me he had the offers and could get the other lands at that price; that was the inducement for me to get my son to sign the deed. The consideration was getting these other lands for less money, adjoining our other lands. If those other lands had not been agreed to be procured for our company I would not have procured from our company the execution of this deed. My son absolutely refused to sign the deed and I told him that Ferguson had promised to get me these other lands and I believed he was an honorable man and would do it. My son whom I speak of as John Hewitt. He was secretary of the Hewitt Investment Company. I was president of the Hewitt Investment Company, but I told Mr. Ferguson at the time that I could not act for the company and he knew it; all I could do was endeavor to get him the lands if he would carry out his agreement. That was fully stated, over and over again, to Mr. Ferguson, prior to the execution of the deed. He knew I could not carry it out without that; I had no authority to. He said he would go back and hunt up the lands and send me a map with the descriptions and I was to send my son right away and look the lands over, see that they had the amount of timber and that it didn't cost over 25 to 30 cents a thousand, equally as good timber,

or nearly so, as the timber I was going to induce the Hewitt Investment Company to deed to him. I have been interested in timber lands in Washington and Oregon for 23 years, buying and selling. I have bought and sold three or four billion feet of timber and am connected with other lumber companies. During the years 1905 and 1906 I was familiar with the value of timber lands in Columbia and Clatsop Counties, Oregon. We considered the consideration named in the deed only a nominal consideration. I told him at the time the lands were worth $30,000 and I think I wrote him afterwards that they were worth $30,000. That amounted to about fifty or sixty cents a thousand, and he was going to buy me the other lands at from 25 to 30 cents adjoining my other lands. The consideration was getting those other lands at the prices represented by Mr. Ferguson. After this deed was sent to the bank at Astoria neither I nor the Hewitt Investment Company ever received the money or any part of it. I or the Hewitt Investment Company never at any time received any consideration whatever for the transfer of these lands. We sent the deed to the bank and told me to deliver it to Mr. Ferguson if he paid the money, and the bank had no authority to turn it over or hold it, or change what the deed was sent for. With reference to the execution of the deed there never was any authority given by the Hewitt Investment Company, through its president and secretary to execute this deed by resolution or otherwise. There was not at any time any meeting of the board of trustees or stock holders of that company at which any action was taken authorizing the sale of the

lands involved in this suit, nor was any action ever taken by the finance committee of the Hewitt Investment Company authorizing this transaction. There absolutely never was any resolution of the corporation; I know absolutely there wasn't any authority given to execute the deed.

COURT: Did the deed recite any resolution of the kind?

Mr. YORK: Well, if your Honor please, the deed cannot be found.

Mr. FULTON: I think Mr. Hewitt in his deposition testified that it did; that the deed said there was a resolution.

A. Oh, well. The deed might have said it; but there was absolutely—never was—I don't think so. I know absolutely that there never was any authority.

To induce my son John who was the secretary of the company to execute the deed, as secretary, I told him that Mr. Ferguson was going to get us those other lands and he had sent us a map and I told him to hustle up and get them; and in the mean-time I had written to the owners of the other lands which he agreed to procure about the other lands and they asked me $1.50 in place of the terms Mr. Ferguson stated. Ferguson sent me a map and I wrote to some of them, but I can not tell you their names now. I found that the lands could not be procured at the prices represented by Mr. Ferguson but that they cost three times what he represented. I figured that he was fraudulently deceiving me on the price of the lands down there for the purpose of getting these four quarter sections. When the deed had been

returned from Astoria I and the company declined to correct it or execute a new deed because in part he asked us to do something that we could not do and we thought he was doing that for the purpose of delay and not paying the money and then we made up our mind that he had defrauded us and was not going to get us the other land, and that he was not going to carry out his part of the agreement, and consequently we refused to return the deed or to try to correct it. About that time or shortly after Mr. Ferguson came to Tacoma when we had a conversation. He tried to have me correct the deed or give him a new deed and I told him our company absolutely refused to make any new deed or do anything unless we could get the other lands. I then made a demand upon him to get the other lands. He said he could not get them without the money and he would have to have this other money to get them with. He said he would have to sell these lands to his company and that is the first time that I knew anything about his company. He said he would have to sell them to some company that he was forming. I never knew anything about his other company until afterwards. In the transaction leading up to the execution of the deed he made no representation that he was acting for any other person than himself; he was acting so far as I knew, for himself entirely. He said he wanted these particular lands because he was trying to form another company, or had formed another company, and he wanted them to fill out his complement to them. I had no knowledge then in regard to the plaintiff Minnesota and Oregon Land and Timber Company. I first heard of

that company afterwards. At the time he said he was trying to form another company, but I didn't have any trade with them or know anything about them. My agreement or talk was all with Mr. Ferguson personally. I was acting in that transaction as a personal matter and told him I would try and get that deed for him if he would get me the other lands, but I had no authority to contract or sell the lands without authority from the company. He knew that and I so informed him before and after the execution of the deed.

The defendant then offered in evidence so much of the secretary's record book of the Hewitt Investment Company as covers and includes the by-laws of that company, and the minutes of meeting of stock holders held November 28, 1890, the minutes of trustees meeting held May 29, 1891, minutes of trustees meeting held January 2, 1901, minutes of stock holders meeting held May 31, 1902, and the minutes of stock holders meeting held May 30, 1903.

Records offered were admitted in evidence marked "Defendant's Ex. D," "Defendant's Ex. D-2," "Defendant's Ex. D-3," "Defendant's Ex. D-4," Defendant's Ex. D-5," and "Defendant's Ex. D-6."

The letter handed me dated December 22, 1905, addressed Henry Hewitt Jr., signed E. Z. Ferguson, was received in the mail by me.

It was admitted that the letter was signed by E. Z. Ferguson. The letter was offered and read in evidence marked "Defendant's Exhibit E," and read as follows:

"Astoria, Oregon, Dec. 22d, 1905.

Henry Hewitt, Jr.

Tacoma, Wash.

Dear Sir:—

I have just completed the abstracts for your land, but have not yet given them to the attorney. I have however looked them over myself and find one matter that needs attention. There are four deeds to the Hewitt Investment Co. and each is signed Lester B. Lockwood, Hattie M. Lockwood By Herbert S. Griggs, her attorney in fact, and we do not find any power of attorney of record from Hattie M. Lockwood. Please inform me if you have the P of A and if so send it with your deed to the Bank; if not, can you get a deed from her? If the attorney finds anything else will let you know, but I do not think there is anything else. Of course you are aware that in Oregon the wife has a dower and her signature is more important than in Washington.

"Up to this time I have been too busy to send you the map of the other land, but will do so soon. There is quite a little work to make it up.

"When can I expect the deed?

Yours truly,

E. Z. FERGUSON,

179 11th Street."

The postal card bearing date, Astoria, Oregon, December 23, 1905, handed me marked "Defendant's Identification A," was received by me in the mail about that date.

Plaintiff offered in evidence defendant's Identification A which was admitted in evidence marked De-

fendant's Exhibit A and read in evidence as follows:

"ASTORIA NATIONAL BANK

Astoria, Oregon, Dec. 23, 1905.

Your favor of the 22nd inst. received with enclosures as stated. (Entered for collection) J. E. Higgins, Cashier."

The letter dated April 30, 1906, addressed The Hewitt Investment Company, signed J. E. Higgins, marked "Defendant's Identification B," was received by me in the mail.

Defendant's Identification B offered in evidence and admitted in evidence marked "Defendant's Exhibit B," as follows:

"Astoria, Oregon, April 30th, 1906.

Mess. The Hewitt Investment Co.

Tacoma, Wash.

Dear Sirs: On Jan. 3, 1906, Mr. E. Z. Ferguson deposited in this Bank $12,800, to be paid to you in Tacoma exchange when the title to the property described in the deed of your company was perfected, the said deed being returned to you for correction on Jan. 9, 1906. We still hold the money. Will you kindly let us know whether or not there is any possibility of the trade being closed, and kindly state whether or not you desire us to hold the money any longer.

Very truly yours,

(Answered) J. E. HIGGINS, Cashier."

The letter handed me dated Astoria, Oregon, January 25, 1906, addressed Henry Hewitt Jr., signed E. Z. Ferguson, was received by me in the mail.

It was admitted that the letter was signed by Mr. Ferguson.

Plaintiffs offered the letter in evidence which was admitted marked "Defendant's Exhibit F," and read in evidence as follows:

DEFENDANT'S EXHIBIT F.

Astoria, Oregon, January 25, 1906.

Henry Hewitt, Jr.,
Tacoma, Wash.

Dear Sir:—

Your recent letter received; it has no date, but was probably written January 13th as the letter to the bank, to which they have called my attention, is dated the 13th. I have just returned from Portland, which will explain why I have not replied sooner to the letter.

I noticed in the letter to the bank that you say that I promised to get you other lands just as good for 30c per 1000; you will please pardon me for contradicting you on this point, but you have either misunderstood or misconstrued my conversation. What I said was that from 25c to 30c per 1000 was about as high as any of the timber buyers were paying in the Nehalem and that I was satisfied you could take the money that you received for this land and buy other lands for a less price, this was to convince you that I was paying what I considered a big price for your lands. I also mentioned particularly that there were some lands adjoining the Hewitt Investment Company's lands in Columbia County which I felt certain that you could purchase for less than you were receiving and that in my opinion it would pay you better to take this money and put it in

there, and in the course of the conversation I said I would make you a map showing this land and send it to you. Since coming home, I have been too busy to get this up as I wanted to, but will enclose the map herewith and will attach to the maps such explanation as I hope will make clear to you what I mean.

Now, in regard to paying interest on the $12800 until you perfect the title, it seems to me that 8 per cent would be too high as money can be procured easily at 6 per cent or less. I would have to keep the money ready to be paid you at any time and could not have the use of it, yet I realize that it does you no good either, lying in the Bank, and before deciding whether to pay interest or not, I would like to know how long a time you would wish to have to straighten the title, so as to know how long I might have interest to pay.

If it can be arranged satisfactory to all of us, I would rather pay the money over to you. In case we would pay the $12800 to the Hewitt Investment Company and take its Warranty Deed to the land, would you and the company be willing to give me an agreement and assurance that you would perfect the title, say within a year, or longer, if need be?

I see no reason why we cannot fix this up without difficulty; the Power of Attorney may turn up, or in any event, Mrs. Strong will get through her honeymoon sometime and come home. Do you know when she procured her divorce? It may be that this would straighten the matter; in any event, it seems to me that if you get the money and we know the title to the land is going to be perfected, that is all that is necessary and we can

all sleep the sleep of the just.

At your rate of interest, the money in the bank is losing nearly $100 a month and I hope we can get it into your hands with the greatest possible speed and would therefore request an early reply.

Yours truly,

E. Z. FERGUSON.

The receipt of this letter was the first time that a misunderstanding appeared to have arisen between me and Mr. Ferguson.

I have made search for all of the correspondence between myself and Mr. Ferguson and have not been able to find any other letters than those produced. The Hewitt Investment Company never complied with the law of Oregon relative to foreign corporations in this state. The Hewitt Investment Company has done no business in this state but to hold land. It has had no office in the state. We have bought all these lands but didn't sell any. This is the only dealing we have had in the state. The Hewitt Investment Company was in the nature of a holding company merely. It took the title to the lands and we supposed as a foreign corporation it could sell them. We just bought the lands and would hold them until we would sell the whole bunch. That is what I tried to talk to Mr. Ferguson, to sell him the whole bunch. We did not procure any correcting deed or the power of attorney from Mrs. Lockwood. The Hewitt Investment Company never executed any other deed than the one that was sent to Astoria and returned. The Hewitt Investment Company at the present time holds the title of record to the lands in-

volved in this suit and the Hewitt Investment Company has paid the taxes upon these lands. The Hewitt Investment Company paid taxes on these lands for 1905, $149.40; taxes paid for 1906, $180.73; taxes paid for 1907, $177.69; taxes paid for 1908, $192.86; taxes paid for the year 1909, $209.98; taxes paid for the year 1910, $223.80. Taxes paid for 1911, $287.97.

The tax receipts were offered and admitted in evidence, marked "Defendant's Exhibit G," "G-2," "G-3," "G-4," "G-5," "G-6," "G-7."

Cross Examination.

Questions by Mr. FULTON:

Now, you have introduced, or your counsel has introduced after you identified it, a letter of August 17, 1905, in which Mr. Ferguson wrote you as follows: "I wrote you some time ago regarding a trade of lands by exchanging your four quarters in T. 6 N. R. 6 W. for a like amount of land adjoining your holdings in Columbia County, but have had no reply. Please let me know if you will consider a proposition of this kind." Now, you wrote back declining that proposition, didn't you?

A. No, sir, I don't think I did.

Q. You don't? You were willing to do it, were you?

A. Why, no, I didn't answer it, and nothing was done, but he came up to talk it over, and convinced me that it was a good trade to make, verbally.

Q. What is that?

A. He came up verbally, himself—he came up and we talked it over verbally, and the trade was made verbally."

Q. You didn't, as a matter of fact—

A. Nothing was closed on any of these.

Q. When he came up and you talked it over verbally, did you agree to it?

A. I told him that I would try to procure him this deed from the Hewitt Investment Company for those lands, and he convinced me that it was a good trade for us to have the other lands adjoining our own.

Q. Now, you say you didn't tell him that you wouldn't make that trade?

A. I told him I would make it.

Q. What?

A. I told him I would, verbally.

Q. I ask you if you didn't write to him in response to his request as to whether or not you would trade these lands, as follows:

A. What is the date of that letter?

Q. No date to it.

A. I testified when I first commenced—

Q. I will ask you if that is your writing?

A. When I first commenced I testified to this correspondence.

Q. Look at that and see if that is your writing.

(Witness examines letter.)

Q. That part is not. That is his letter to you.

COURT: That has been introduced?

Mr. FULTON: Yes, sir.

A. I testified when I first came that I offered him—

Q. Answer the question—is that your writing, Mr. Hewitt?

A. Yes, sir.

Q. Now, this writing that is appended to the foot

of this letter of July 24, 1905, was in response to this letter from Ferguson to you repeating the request under date of August 17, 1905, wasn't it?

A. Well, I couldn't tell you. I presume so.

Q. You had evidently been away, hadn't you?

A. Yes, I couldn't tell you that.

Q. Well, you say in this letter you had been away, and therefore he wrote again to you.

A. Yes, I—

Q. And then didn't you answer as follows: "Yours received on my return." That is answered by indorsing on the foot of his letter "Yours received on my return. I hardly care to trade lands. I might sell the whole bunch at $20 per acre. It is heavily timbered, will average from six to nine million per claim. One claim somewhat burnt." Now, you wrote that, didn't you?

A. I think I did.

Q. Then you did decline to make a trade, didn't you, and said that you preferred to sell?

A. Yes, the whole bunch.

Q. Well, but you declined to make the trade, didn't you?

A. At the time, yes. But then he came up.

Q. Why do you now say that the consideration was that there was to be a trade?

A. Because he came up, and we verbally changed it, and agreed to make a trade.

Q. Agreed to make a trade?

A. Yes; after all these letters.

Q. Why didn't you say somthing of that—

A. That is after he wrote back and offered me—

Q. Why didn't you say something of that in your letters that you wrote to the bank?

A. Because I didn't think it was any of the bank's business.

Q. Well, why did you write to the bank? I show you plaintiff's exhibit 1, and ask you if that is your signature?

Mr. YORK: It was offered in evidence.

Mr. FULTON: It is admitted to be, I believe.

A. That is my signature.

Q. Now, under that date you wrote to the bank saying "Please deliver the enclosed deed of lands in 6-6 west to E. Z. Ferguson for $12,800 net to us in Tacoma funds." Now, you didn't say anything there about him depositing any deed making any trade, did you?

A. The bank didn't have anything to do with it.

Q. Well, you authorized them to let him have the deed?

A. Yes.

Q. You hadn't received any deed or contract or anything for any of these other lands, had you?

A. I received Mr. Ferguson's letter, and I received the maps, and he said he would send me—

Q. Did you receive a letter from him in which he said that he would get these lands for you?

A. He said he would send the map and would get prices.

Q. What letter was that?

A. I think it was here.

Q. Is that the letter that was just read here, just introduced?

A. He came up, you know, and made the agreement verbally. All these letters didn't amount to anything.

Q. Is that this letter of January 8, 1906?

A. What does it say?

Q. Look at that, and see if that is the letter. That is one that your counsel just had in his hands.

A. I received this letter from Mr. Ferguson.

Q. There is nothing about any timber in that, is there? That is under January 8th.

A. You have got some of my letters on deposit here where I told him to hustle up and get me that land.

Q. Well, I will come to that hustling letter. I want you to tell me the letter that he wrote to you.

A. I can't remember all these letters, my dear friend.

Q. Can you point out a single letter?

A. They are all here.

Q. Can you point out a single letter in which Mr. Ferguson promised you to get you these lands? You say you had this letter.

A. My agreement was verbal with him to get me these lands. Then I had his letters.

Q. You said a moment ago, in response to my question why you told the bank to deliver that deed on the payment of the $12,800, and asking you at the same time why you didn't insist on having a deed for these other lands at the same time, you said you had Mr. Ferguson's letter promising to get those lands. Now, where is that letter?

A. I don't think I had such a letter.

Q. Why did you say you had?

A. I made a mistake if I did.

Q. Did you get that letter from Mr. Ferguson, which is one your counsel just had?

A. I did, yet; I think I testified.

Mr. FULTON: I wish to offer that. That is the one counsel had.

Marked "Plaintiffs' Exhibit 10," and reading as follows:

PLAINTIFFS' EXHIBIT 10.

Astoria, Oregon, January 26, 1906.

Henry Hewitt,

Tacoma, Washington.

Dear Sir:—

Attached herewith is the map of Columbia County which I promised to send you when I was in Tacoma. I have marked on the map the lands of the heavy holders of timber, and you can tell from the margin who these owners are. You will see that sooner or later three or four of them will be anxious to purchase your lands. The Sage Land & Improvement Co. own a great deal of land further South, which I have not marked on the map. I have crossed with a lead pencil the bunch of land adjoining yours which I said, in my opinion would be better for you to own than the lands in 6-6. This part of Columbia County is not nearly so rough as Clatsop County, the land is more rolling and more like Washington, making it much easier for railroads to operate, and I believe that it would be worth your while to take the money that you get out of the 6-6 land and buy this land that I mention. I have not had them cruised, but from a conversation that I have had with the owners and timber men, it is heavily timbered with about the same class

of timber that there is in 6-6, and it can be purchased, or could be a short time ago, when I was talking with the owners at prices ranging from $10 to $15 per acre. If, after looking at the map, you think you would like to consider the purchase of this land that I have crossed in pencil, I will put myself in communication with the owners of it and submit prices to you a little later on.

Benson's logging railroad is now built from Clatskanie in 7-4 to a point in section 15, where I have marked with pencil. There is also a logging railroad operating from Goble up Goble Creek, also one from Columbia City running Westward. All these roads are headed for the Nehalem and will sooner or later reach the vicinity of your land, and it seems to me that land located like that and as well timbered as you say it is, is better property to have than what you own in 6-6. If there is any further information that you would like to have regarding this map, I will be pleased to furnish it upon request, excepting that I cannot give the amount of timber upon these lands, any more than their reports are that it is well timbered.

Yours truly,

E. Z. FERGUSON."

Q. Now, this deed that was executed, you say you had hard work getting your son to sign it?

A. Yes.

Q. And you say that you never had had a meeting of the board of directors?

A. Yes, sir.

Q. Is that true—about this land?

A. Yes, absolutely.

Q. You say you never had any meeting of the board of directors about this land?

A. No.

Q. Now, you are a truthful man, aren't you, Mr. Hewitt?

A. Yes, sir. Go ahead.

Q. You always tell the truth, don't you?

A. I try to. I make a mistake sometimes.

Q. Well, you wouldn't deliberately write an untruth, would you?

A. No, sir.

Q. Here is a letter of yours bearing date January 5, 1906, addressed to Mr. Ferguson, attached to your deposition—Plaintiffs' Exhibit A—"About the commission, the company some time ago passed resolutions to only allow 2½ commissions for sales of lands, of which I was not informed. Besides this, when I brought the matter up the directors all but myself were against selling, and would not have consented at all only to accommodate me."

A. Well?

Q. You wrote that, didn't you?

A. Yes, sir.

Q. Was it true?

A. Why, yes. But I went around and saw them all.

Q. Oh, well, you did see all the directors?

A. I went around and saw them about that.

Q. Then all the directors did consent to your making that deed?

A. No, I made a mistake. One of the directors was in New York, and I couldn't see him.

Q. Well, now, is that true? Is that what you meant by that?

A. I saw the ones that were there. That is what I meant. The directors—I saw all there.

Q. This is what you said: When you brought the matter to the attention of the directors, they were all opposed to it excepting you, and only consented to accommodate you.

A. Well, there were three there.

Q. What?

A. There were two or three, and the one in New York couldn't be there.

Q. Now, who was in New York?

A. Why, what is the last director there?

Q. Now, remember this was in 1905. What director was in New York at that time?

A. Well, the third one. I will tell you who I did see.

Q. Who were the directors at that time?

A. The directors that I saw was my wife and John and myself.

Q. Now, what other director was there at that time?

A. Well, there was Mrs. Norton, but she wasn't a director.

Q. Don't you know that there were only three directors at that time, sir?

A. I think there were five always.

Q. Will you swear that there were five directors at that time?

A. Yes. They held their office till their successors were appointed, as I understand it.

Q. Who were the stockholders at that time?

A. Why, there was Mrs. Norton—I can't remember them all.

Q. In 1905?

A. Yes. I can't remember them all.

Q. In January, 1906?

A. I can't tell you who they were, all of them. This stock is divided now with quite a number. I couldn't tell you how much. I owned about one-third of it, I think.

Q. Now, you owned what?

A. About one-third of it.

Q. You owned about one-third of it in 1905?

A. Yes, sir.

Q. Didn't you swear, sir, in your deposition, that you owned all of it at that time?

A. Well, I looked after it. It was in my name, and I looked it up, and—

Q. Will you answer my question? Didn't you swear in your deposition that you owned all of it except a share?

A. No.

Mr. YORK: I object to that. The deposition will show. This is an attempt to catch the witness. The witness intends to be fair. If there is any mistake, it is entitled to correction, but I don't want the witness to be put in an unfair position.

Mr. FULTON: I have a right to ask him if he didn't swear so and so.

A. I think I didn't swear such a thing. You are making it up.

COURT: The deposition has been taken some time, and it would be better if you would call his attention to what he said in the deposition, and let him see it.

Mr. FULTON: Mr. Ferguson, I wish you would go down to the office and get my copy of the deposition.

Q. Where is your stock book?

A. I don't know.

Q. What?

A. I don't know. I haven't seen it.

Q. Well, how do you tell who are the stockholders, or who were the stockholders at that time?

A. Well, we haven't looked them up for some time.

Q. Now, do you say you only owned one-third of the stock in January, 1905?

A. That is all.

Q. Who owned the rest of it?

A. My wife and John and Henry, and my daughter Mary, and Mrs. Norton.

Q. Now, how much did your wife own?

A. I don't know.

Q. How much did John own?

A. I don't know.

Q. How much did you own?

A. I looked mine up, and it left me about one-third. I signed it and put it in the safe, and they are signed and not transferred on the books.

Q. You signed it putting it over to your wife?

A. Yes. No—

Q. And John?

A. John and—

Q. Who is Mrs. Norton?

A. Mrs. Norton is the secretary of the St. Paul and Tacoma Lumber Company, and she is a widow, and her husband—

Q. I know, but what relation is she to you?

A. No relation to me. She is my wife's sister.

Q. She is your wife's sister?

A. Yes.

Q. Now how much did you sign over to her?

A. I didn't sign any over to her. This man has always had this stock.

Q. How much had he?

A. I don't know.

Q. Oh, yes, you know?

A. Well, I can tell you honestly I don't.

Q. You don't know?

A. No, sir.

Q. Haven't any idea?

A. I can guess within a thousand or so.

Q. How many shares are there altogether of that corporation?

A. I think that said there was 57,000, but I think there was more stock than that.

Q. You said there was 50,000, of which 37,000 was taken.

A. Yes.

Q. That is what you said in your letter?

A. Yes.

Q. Now, how many shares of stock were there of the corporation?

A. I didn't look it up. I think there is considerable

more than that. I know there is.

Q. Very well, how many are there, if you know?

A. The reason we are mixed up is that we haven't been taking care of it.

Q. What is the value of each share?

A. I don't know.

Q. Don't you know what the par value of each share is?

A. Oh, yes. $1.00.

Q. One dollar?

A. Yes.

Q. Is it $1.00 or $100.00?

A. $100.00.

Q. Well, that is what I thought. Each share is $100.00 par value?

A. Yes.

Q. Then, if there is 50,000, it is 500 shares?

A. Yes, sir.

Q. If there is 37,000 of it taken, there are 370 shares, aren't there?

A. I think that the stock of the company was to be more than 50,000, but I don't think only 50,000 was paid in, but I don't remember. I cannot tell you.

Q. Your bill shows, and your record shows, it was incorporated for $50,000, doesn't it?

A. I think—

Mr. YORK: They are the best evidence.

A. They are the best evidence.

Q. Sure, they are the best evidence, he says.

A. What is the use of bothering me, when I don't know?

Q. Do you want to be understood as swearing here that you don't know how much the capital stock of that corporation is.

A. He read it over two or three times. It is 50,000, I believe; and I was saying I think that—

Q. Your letter introduced here said that only 37,000 of it was taken. Was that correct?

A. We made assessments every time we bought any land; if we paid money, we made assessments to each one, and they paid it; and I didn't keep track of it, and that is the reason I don't know.

Q. In the course of these negotiations, Mr. Ferguson wrote and asked you what the amount of your capital stock was, didn't he?

A. Yes.

Q. And you wrote back and told him it was $50,000, but only 37,000 had been taken, didn't you?

A. Well, that is, I heard you read that letter, but I wasn't sure—I guessed at it.

Q. You just guessed at it?

A. Yes.

Q. I see. You didn't think it was of sufficient importance to be accurate?

A. It was near enough.

Q. Let us get back to the proposition. That being the case, do you mean to say that you cannot tell the court anything near what Mrs. Norton had in stock?

A. No, I cannot. She has paid it all in small amounts for four or five years, while we were buying these lands —her and her husband.

Q. Who sold it to her—you?

A. No, she took stock—he was one of the original incorporators.

Q. She or her husband?

A. Her husband.

Q. He took ten shares, didn't he?

A. I don't know how much he did take.

Q. Don't you know that he took ten shares?

A. I know he has got more than ten shares now.

Q. He or she?

A. Well, I don't know whether the administrator or she has got it. I couldn't tell you that.

Q. But you don't know how much?

A. No.

COURT: Who is the secretary of this company?

A. My son John.

COURT: I thought maybe you were?

A. Oh, no.

Q. Your son John is secretary?

A. Yes. He has got full charge of it, and I haven't looked at it at all.

Q. You were the president?

A. I haven't never looked at it.

Q. Answer the question.

A. Yes.

Q. And your wife is a director?

A. Yes.

Q. You now swear that Mrs. Norton was a director in 1905?

A. No, I don't swear that.

Q. Who was?

A. I just told you that she was a stockholder.

Q. Very well; I am asking you who were the directors.

A. Well, Seeley—

Q. Do you say Seeley was a director in 1905 or 1906—January, 1906?

A. I don't know whether he went out at that time or not. I don't think he did. I don't remember when he went out.

Q. You had bought all his stock, hadn't you?

A. No, I bought the stock, and didn't make the transfer for a year and a half.

Q. Well, but you had it?

A. No, I didn't.

Q. It was your stock, wasn't it?

A. No, it was up in the bank, and he had it.

Q. You say you bought it?

A. Well, I hadn't paid for it, and so he kept it.

Q. When did you buy it?

A. I couldn't tell you that.

Q. You had bought it before January, 1906?

A. I had an agreement for it—he bought it—I will tell you now just how it is, if you want to know. He bought it from Mr. Lombard, and then when he bought it from Mr. Lombard, he took an agreement from me that when he wanted the money that I would pay him the money for that stock, and so it ran along for a year and a half or so before he came and demanded it, and then it ran nearly another year before I paid him the money.

COURT: But you got his stock?

A. No, I didn't get it till after I did pay him.

COURT: I mean, you got it finally?

A. Finally, yes. After this transaction, though, was entered into.

Q. Who are the directors or trustees now?

A. Why, I think there is only just the three. We haven't had the meetings on the plan of those that were elected.

Q. What three are there?

A. It is myself and John, and my wife, I think.

Q. Yourself, and your son John, and your wife?

A. Yes.

Q. How many shares of stock does your wife hold in the company?

A. I think I assigned to her 5,000 or something. I don't know.

Q. What?

A. It is assigned, and in my safe—assigned over to her 5,000 shares.

Q. These shares you indorsed to her?

A. Yes.

Q. But never have been delivered to her?

A. Well, part of them have.

Q. How many have been delivered to her?

A. I cannot tell you.

Q. How many have been delivered to your son?

A. Why, I think about—I don't know—four or five thousand; I don't know. I really don't know.

Q. Don't you know that—

A. I divided it all up, but—

Q. Don't you know that he never had but ten shares?

A. I couldn't tell you. I really couldn't tell you. I couldn't tell you, honestly. You see, the reason I don't

remember is because I assigned them over, and they are in the safe, and they have not been transferred.

Q. When you wrote this letter to Mr. Ferguson and told him you had had this matter of his commission up before the board of directors, you wanted him to believe that was the fact, didn't you?

A. I went and saw them, the three that was there.

Q. That stated the board of directors, didn't it?

A. Yes, sir, but I couldn't see those that were not there.

Q. Who were not there?

A. I considered until after Seeley delivered that stock that he was a director.

Q. You considered that he still remained a director?

A. Yes.

Q. He didn't have any stock?

A. Oh, yes, he did. He had it, I think, about a year after this transaction, before I got the money for him—before I paid him. He kept the stock until I paid him.

Q. You didn't consult Seeley?

A. No.

Q. But you consulted your wife and your son?

A. Yes, and Mrs. Norton.

Q. And Mrs. Norton?

A. Yes.

Q. Consulted all of them?

A. Yes. They had part of the stock.

Q. And they all agreed to the deed being made?

A. No, they didn't. They objected all the while.

Q. Well, but you said they did it to accommodate you; is that true or not?

A. John did.

Q. No, this is what you say in your letter—the rest of the directors agreed to it to accommodate you.

A. Well, there was nobody but John there.

Q. Well, then, you didn't tell the truth in that?

A. No, I made a mistake if I said that; because they didn't say so. Now, I am telling it just as I understand it.

Q. Well, now, in your deposition, taken at Tacoma in this case on the 31st day of January, 1912, I will ask you if you didn't testify as follows: "Q. Now, after the organization of the corporation Mr. Lombard sold his interest out to somebody here? A. Later on, yes, sir. Q. When was it he sold, do you remember? A. I do not know; I couldn't remember. Q. To whom did he sell? A. He sold some of the stock through Mr. King, to me, and as I remember, although I am not sure, then he sold the larger amount of the stock to Mr. Seeley. Q. What Seeley? A. Seeley the real estate man. "Now, then, have you any idea when that was? A. No. Q. How much did he sell to you? A. About one thousand dollars worth, through Mr. King. That would be ten shares."

A. That is a mistake right there. That was Mr. King was ten shares.

Q. This is what you said: "About one thousand dollars worth through Mr. King. That would be ten shares." That would be ten shares, wouldn't it?

A. Mr. King was ten shares, but Seeley was nearly one-third.

Q. The next question: "You held 490 shares to

start with? A. I presume so; about half the stock. Q. According to this record Henry Hewitt, Jr. 490, Lombard 490; A. N. Fitch, 5; and P. D. Norton 5, and Mr. King 10; at the organization meeting? A. I think that is right. Q. And Mr. Seeley purchased the remaining shares of Mr. Lombard? A. Yes."

A. I think that is right.

Q. "Q. Does he still own them? A. No, sir. Q. Who owns them now? A. I think I bought them of him. Q. When did you buy them? A. I couldn't tell you exactly, but two or three years ago. Q. Have you the record of their sale to you? A. I do not think so. Q. Haven't you anything to show when you purchased them? A. No. He got into trouble with his wife and came to me and sold them to me one day in a hurry; I bought them personally." Now, is that true?

A. Yes. But then he didn't turn them over to me.

Q. Well, he was in a very great hurry to sell them to you?

A. Well, he didn't turn them over to me.

Q. But he didn't turn them over to you for a year?

A. No.

Q. But you bought them at that time?

A. Yes. He had an agreement with me, as I told you, that I would buy them at par if he ever wanted the money. And then he demanded me to take them.

Q. When you drew up the deed, it read as a regular corporation deed, didn't it?

A. I don't think so. I think it was an over-and-under deed. What makes me think it was an over-and-under deed was because we always make that kind of a deed.

Q. Over-and-under, what do you mean?

A. We guarantee as far as all our actions are concerned.

Q. You mean to say it was not a general warranty?

A. No.

COURT: You mean a special warranty?

Mr. YORK: He means a special warranty deed.

Q. I am talking about regular corporation deed. You have a regular corporation deed for your corporation to execute, don't you?

A. No.

Q. What was this?

A. I don't think it was anything but just a deed that I told you.

Q. Don't you know what a corporation deed is?

A. No, not every one—every corporation gets a deed to suit themselves.

Q. This was executed in the name of the corporation, wasn't it?

A. Yes; oh, yes.

Q. And it recited that it was executed pursuant to resolution of its board of directors, didn't it?

A. I don't think so.

Q. You don't remember that?

A. Well, if it was, it was not true, because the directors didn't do it. I don't believe it was.

Q. Well, but you had consulted the directors?

A. Why, no, I hadn't consulted about this deed at all, I said; I just let John decide it. I told you I didn't consult the directors.

Q. You say that John signed it to accommodate you?

A. Yes,, he thought that Ferguson would fix that up, and then we could go before the directors and get them to sanction it.

Q. That is what he thought?

A. Yes.

Q. Why did you send it over to the bank, then, with instructions to deliver the deed to him on payment of the money?

A. Well, we thought it was all right. I knew well enough that if he did his part of the agreement, it would fix that deed right some way.

Q. What was his part of the agreement?

A. It was to get me these other lands.

Q. Where is there anything in any of the writings that said that?

A. There isn't anything in the writings. It was a verbal agreement. The writing is—he said he sent a map; I told him to hustle and get me the other lands.

Q. Now, you said Ferguson asked you to do something that you couldn't do. What was it he asked you to do?

A. He asked me to get this lady that—

Mr. YORK: Lockwood?

A. Lockwood, to sign another deed.

Q. Well, but you answered in your letter that you could get that done.

A. Well, but I didn't know how long—I didn't know where she was.

Q. Didn't you write him and tell him that her signature could be secured when she returned, and that you had a power of attorney?

A. Why, I told him that I understood we had, and that I thought her signature could be got when she got back.

Q. Do you mean to say Mr. Ferguson asked you to get her signature?

A. Yes, sir.

Q. In one of the letters to you?

A. I don't know. He came up three times.

Q. Now, didn't Mr. Ferguson write you in a letter, and simply ask you to get either the original power of attorney or a certified copy, and send it over and have it recorded? Isn't that all he asked you?

Mr. YORK: The letters will show.

A. The letters will show.

Q. He knows what the letter is.

A. He came up himself—

Q. What?

A. The letters will show.

Q. Don't you remember Mr. Ferguson writing you that?

A. Never got anything out of these letters, and he had to come up himself and have a verbal agreement to have anything done.

Q. Don't you remember Mr. Ferguson writing to you to get a certified copy of the power of attorney?

A. I don't remember that.

Q. Didn't he write you on January 3rd, "If, at the same time, you have an original power of attorney to Mr. Griggs from Harriett M. Lockwood, it could be sent over and recorded in this county. If you haven't the original. you can have a certified copy made from the

records there, which will answer the same purpose"?

A. He came up and we talked that.

Q. You remember of his writing that way, don't you?

A. I remember him writing me, yes.

Q. That was not impossible, was it?

A. Why, yes, I couldn't get Mrs. Lockwood.

Q. Couldn't you get a certified copy of that power of attorney?

A. I couldn't find it, and didn't find it.

Q. You didn't find it?

A. No.

Q. You swear you looked for that power of attorney? Did you go to the records and look?

A. No, I didn't.

Q. You know it is on record there, don't you?

A. No, I didn't know that.

Q. Don't you?

A. I went to Mr. Griggs, and he thought it was, and that is all I know.

Q. You didn't go over there to look to see whether it was or not?

A. No. I didn't care, because the trade was off.

Q. Then that wasn't one of the grounds, was it? That wasn't the impossible thing he asked you to do, was it? You say he asked you to do things that were impossible. I want you to tell what it was.

A. One was to get this Lockwood; and he said we couldn't give a deed unless we paid the state.

Q. You could pay the state, couldn't you?

A. I didn't want to.

Q. Did he make that a condition?

A. They were all conditions when he ordered the deed back.

Q. They were all conditions when he ordered the deed back?

A. He put up his money upon condition.

Q. Didn't he write you that, so far as conforming with the laws of Oregon was concerned, it was not necessary; that they would not insist on that?

A. Well, he thought probably afterwards, when he come up and found this thing on record himself, he thought we could get along.

Q. Didn't he, as early as the 3rd day of January, write you as follows: "In regard to the Hewitt Investment Company's having failed to comply with the Oregon Laws governing foreign corporations, we will not let this delay the deal"?

A. He came back home, after he had talked to me up at Tacoma, and cooked that letter up, I suppose to make it stick.

Q. Now, you are willing to testify to that, are you?

A. Yes, that is just what I think he did.

Q. When was that deed sent back from the bank?

A. I cannot tell you. The records will show.

Q. The records will fortunately show just when that was sent back from the bank. Now, on December 22nd you sent the deed, didn't you?

A. I don't know, I tell you. I can't tell you the date.

Q. Well, look at that. That is your signature, isn't it?

A. Yes, that is my signature.

Q. Well, that bears date December 22nd. Now, on January 5, 1906, you wrote to the Astoria National Bank, saying, "The Hewitt Investment Company or Henry Hewitt sent you some time ago deeds to deliver to E. Z. Ferguson on payment of $12,800. I think the deeds it seems are faulty, and Mr. Ferguson wants them changed. You will please return them, and oblige." Now that was on the 5th of January, so the deeds had not been returned at that time, had they?

A. Evidently not.

Q. You wrote for them on the 5th of January. Well, now, this was on the 3rd of January that Mr. Ferguson wrote you as follows: "In regard to the Hewitt Investment Company's having failed to comply with the Oregon laws governing foreign corporations, we will not let this delay the deal." Then he hadn't put up any job there, had he?

A. They probably crossed. He wrote that down here, and it didn't get there, and I was away probably and didn't get it, or I wouldn't have written that.

Q. It so happens, Mr. Hewitt, and I call your attention to this fact, that this letter of January 3rd, in which he makes this statement, says: "This morning I wrote to the Hewitt Investment Company, which letter you will undoubtedly receive about the same time that you receive this, and at noon today, I received your letter of the 2nd, to which I hasten to reply." Now, this letter to the Hewitt Investment Company bears date the same as this, namely, January 3rd—Astoria, Oregon, January 3rd. "On December 26th I wrote you in regard to the title of your land which I am purchasing, stating

that there was lacking in the title, a power of attorney from Harriet M. Lockwood," etc. Now, it was in response to his letter of January 3rd that you wrote your letter of January 5th to the bank to send the deeds back, wasn't it?

A. I don't think so.

Q. How long does it take a letter to go from Astoria to Tacoma?

A. It takes four or five days very often.

Q. From Astoria to Tacoma?

A. Yes. They come up here, and they lay in this postoffice, and then they go somewhere else, and sometimes it is all kinds of time.

Q. If they go in regular course of mail, they will get there in 24 hours, won't they?

A. Half the time I am not there.

Q. I am supposing you are there. You know what is due course of mail? It comes up from Astoria on the railroad to Goble, and crosses there at Goble?

A. No, it comes clear to Portland, as I understand.

Q. Well, if it comes clear to Portland, it goes out of its way, doesn't it?

A. Yes.

Q. If it goes in due course of mail, it goes in 24 hours, doesn't it?

A. No.

Q. You will observe that Mr. Ferguson in writing to you says, on the 3rd of January: "This morning I wrote to the Hewitt Investment Company"—that is, January 3rd—"which letter you will undoubtedly receive about the same time that you receive this, and at

noon today,"—no, that is so, I was wrong in the inference. There is a comma there. No, he doesn't say that you would receive it at noon.

A. No.

Q. But you ought to receive a letter in 24 hours, oughtn't you?

A. I don't think—it comes up here and then it goes back.

COURT: Do you know it comes to Portland?

A. Well, I understand it does. I wouldn't swear to it, Judge. That is the way I understand it.

COURT: It is out of the usual course, if it does.

Q. You know, as a matter of fact, Mr. Hewitt, if a letter came to Portland, it would come up either on the night train or on the morning train. If it was written on the 5th, it would come up on the night train to Portland, wouldn't it? It would arrive here at Portland, and go to Tacoma the next day, wouldn't it?

A. Well, I am nearly positive that I hadn't got that letter, because I would have wrote different if I had.

Q. Wouldn't it?

A. I think they passed in the mail. That is what I think—if I want to guess at it.

COURT: I don't know what the course of mail is, but I supposed that mail was distributed on the cars, and that the Washington mail, especially for Tacoma and Seattle, went through.

A. The train all comes around here now, Judge.

COURT: Would go by Goble. The mail is distributed on mail cars.

Mr. FULTON: Undoubtedly. But it wouldn't make

very much difference whether it was or not. It couldn't be over 24 hours, in any event. It couldn't possibly be.

A. I have been there lots of times, and saw them.

Mr. YORK: I don't want to object to this, if the court please, but it seems to me it is getting into an argument and wrangle on an immaterial matter, loading up the record here unnecessarily. I just object to it on that ground merely.

COURT: I don't think it is very material, but it is a matter of information that I was not aware of. I supposed the mail from Astoria would be distributed on the cars, and would probably go to Tacoma without coming to Portland.

A. Judge, I wouldn't swear to it, but I am nearly positive that it didn't.

Q. You don't pretend to say, in any of these letters, you have any letter from Mr. Ferguson in which he undertook, or made it part of the bargain or contract for the purchase of this land, that he was to get you other land?

A. His letters there that you have got here in evidence says that he will send me a map, and he will look up the lands. My letters to him says, Hustle up and get those lands.

Q. You are basing your statement, then, on what those letters say, are you?

A. I am basing my statement on what he promised to do verbally, if I got this deed for him.

Q. You mean to say he promised it in these letters just as much as any way?

A. No, his main promise was up there, when he

agreed if I would try to get that deed he would get me these other alnds.

Q. Are these letters that he wrote in regard to getting these other lands all in line with his conversation with you?

A. No, it ain't. He tried to get around it in the letters.

Q. There wasn't any occasion for him getting around it in the letters if he was opening negotiations?

A. Yes; he was getting my lands for about half what they were worth, and he was going to get me these other lands for less; and he was trying to have me fix the deeds up, and then I would never get his lands.

Q. The fact is the prices of your lands went up considerably after you entered into this bargain?

A. No, they didn't. In some of these letters I wrote him that the lands were worth $30,000.

Q. Yes, I know, but you also told him you had the matter up before the board of directors?

A. Well, now, I have told you about the board of directors, and you keep harping over that. If you got me to testify there like your freak law here, you get me to say something that is not true.

COURT: That won't do. You answer his question.

Mr. YORK: Just answer the question. That is all.

A. I apologize.

Q. You say you told Mr. Ferguson that you had no authority to sell the lands?

A. Yes, sir, time and again.

Q. When did you tell him that?

A. Every time I talked to him.

Q. Why did you tell him that?

A. Because he knew well enough I couldn't sell it without getting my board together.

Q. You told him all that, did you?

A. Yes, sir, time and again.

Q. And yet he didn't care anything about the board getting together?

A. Oh, he thought I would get it through some way.

Q. What?

A. He thought I would get it fixed up for him some way.

Q. If you told him you couldn't do it without getting the board of directors together, why didn't you get them together before you sent the deed?

A. Why didn't I do a whole lot of things? When a man has a thousand things to do, he neglects some things.

Q. You say you kept telling Mr. Ferguson all the time that you could not sell the lands without getting your board of directors together?

A. Yes, well, I didn't sell them. We never did sell them. He never had no title.

COURT: Just answer his question, Mr. Hewitt.

Q. Why were you telling him that, is what I want to know? Why did you tell him that?

A. Because I thought if he would produce his lands that I could get the board to fix it.

Q. That is not an answer to the question.

A. That is the reason.

Q. You say you kept telling Mr. Ferguson continuously that you couldn't sell these lands, that you had

no authority to do so?

A. Yes, sir.

Q. Without getting your board of directors together?

A. Yes, sir.

Q. Why did you make that statement to him?

A. Because it is true.

Q. Well, but what was your motive and purpose in making the statement.

A. Well, because it was true, I couldn't do it.

Q. Well, didn't you intend to get them together?

A. No, not till he—I didn't think there was any need of it, and part of them were not there, till he delivered his lands.

Q. You didn't think there was any need of it?

A. No.

Q. And yet you told him that you couldn't make the sale without doing it?

A. Yes. It wasn't no legal sale.

Q. You didn't think it was a legal sale?

A. No legal agreement that I made.

Q. You thought when you sent down this deed to the bank with instructions to turn it over to Mr. Ferguson when the $12,800 was paid, you thought you were giving him an illegal deed, did you?

A. No, I didn't. I thought that he would get this land and give me the other, and then I could go to the directors and get them to fix it up.

Q. But if he didn't do that, if he didn't get these other lands, why, you would have his money and he would not have a deed that was worth anything? Was

that your idea?

A. We haven't got anybody up there that keeps that—

Q. Was that your idea?

A. No, sir.

Q. If he didn't get you these other lands, you intended to go back on it, did you?

A. Yes.

Q. If he didn't get the lands, you intended to go back on it even if you did have the money, didn't you?

A. Oh, no, couldn't do it.

Q. Then, when you sent down instructions to the bank to turn over that deed upon payment of $12,800 by Mr. Ferguson, to him—

A. I was addressing—

Q. Now, wait. If it had been done, if the bank had turned over the deed and you had got your $12,800, the matter would have been closed entirely, and you would have had no claim for these other lands, would you?

A. Yes, I would have immediately sued Mr. Ferguson to produce his lands.

Q. You would have sued him?

A. Yes, sir.

Q. You keep saying here all the time that you cannot sue where there is not any written contract—

Mr. YORK: You are getting into argument with the witness.

COURT: That is a legal question.

A. I am glad you called him down once.

Q. You mean to say that you had that in your mind that you would sue him?

A. Yes, sir.

Q. At the time you sent this deed down?

A. I had it in my mind that I didn't have any real idea at all but what he would do what he agreed to and get us the lands. I told my son so. I believed he would get the lands there, and I trusted him with that.

Mr. YORK: You believed that at that time, did you?

A. Yes, sir.

Redirect Examination.

Q. Mr. Hewitt, in view of the cross-examination, just state whether it was your intention to have the execution and delivery of this deed ratified by the Hewitt Investment Company.

A. It was, if I got the other land.

Q. And that was not done because why?

A. Because they would not agree to it when they didn't get the land.

Q. Because he failed or refused to deliver the other property?

A. Yes.

Q. Now, then, was there any subsequent meeting of the corporation ratifying that transaction?

A. No, sir.

Q. I will ask you whether this record book here contains a record of all of the meetings of the Hewitt Investment Company that were held?

A. Yes, sir; excepting where I went and saw the directors.

Q. Well, I am talking about regular meetings of the

corporation.

A. Yes, sir.

Q. Of the trustees or stockholders?

A. Yes, sir.

Q. I don't want to ask a leading question, but it would save time if they won't object to it on that ground —I was going to ask this quetsion: Was it not a fact that this was handled by you as a personal transaction for the purpose of turning it in to the company, and then having it ratified by the company afterwards?

Mr. FULTON: Objected to.

Mr. YORK: I admit it is a leading question, but I don't know how to frame it otherwise.

COURT: You may ask the question.

Q. How was this transaction handled by you—as a personal matter, or as a company matter, up to the time of the delivery of the deed?

A. It was handled all the time as a personal matter with me. Mr. Ferguson, it was a personal matter with him, and it was a personal matter with me; and I agreed to try to get it.

Q. With what intention on your part with reference to the company afterwards?

A. It was my intention to get it ratified when he got his lands or did what he agreed to; and I should have done it anyway, because I believed he would do it.

Q. State whether or not you were acting in good faith absolutely in that transaction at that time.

A. Yes, sir, acting in good faith.

COURT: Mr. Hewitt, what was the custom of the company in giving deeds of land when they sold lands,

as to adopting a resolution.

A. Judge, that company, you see we never deeded any land ,and didn't have any custom. We didn't do anything. All we did was to buy lands.

Mr. YORK: I might say, if your honor please, that there is some testimony on that point in the depositions, which your Honor will find when you come to read it.

A. You see we didn't have any custom. We never did deed any lands.

COURT: I suppose that is gone into?

Mr. YORK: That was gone into upon the depositions.

(Excused.)

Mr. YORK: There is just one other matter. I want to just testify to one matter myself. I understand there is some rule on which it will affect the argument in the case.

COURT: The court will permit you to do that.

E. R. YORK, sworn as a witness on behalf of defendant, testified as follows:

I desire to state that for several years last past, and prior to and since this transaction, I have been the attorney for Mr. Hewitt, personally, and several of his corporations—the corporations in which he is interested. And referring to the record book of the corporation—secretary's record book—I wish to say, in referring to the purported record of a meeting of the stockholders on May 29, 1909, that appears on pages 42 and 43, and the meeting of trustees on May 29, 1909, appearing on pages 44 and 45 of the record book, which records are not signed by any officer of the company, that those minutes

were prepared by me at the request of John Hewitt, as near as I can recall, on about that date, he stating to me that the company intended to hold meetings of the stockholders and trustees, at which they proposed to take some corporate action, and indicating certain action of the corporation which he desired me to embody in the minutes of the stockholders and trustees; and pursuant to his request I prepared those purported minutes of the meetings of the stockholders and trustees dated May 29, 1909, which now appear to have been pasted in the record book, but are unsigned. But those minutes are not prepared pursuant to any meeting actually held of either the trustees or stockholders, to my knowledge, and I was not present at any meeting when such corporate action was taken. I make this explanation as explanatory of certain testimony appearing in the depositions.

Cross Examination.

Questions by Mr. FULTON:

Mr. York, were you an officer of the corporation?

A. I was not.

Q. Nor a stockholder in it?

A. Nor a stockholder. I had no capacity except as an attorney.

Q. So meetings might be held without you?

A. They might have been held without my knowledge. But I desire to state they are not pursuant to any meeting at which I was present, and, so far as I had knowledge, the action recited in those minutes was not taken, but those were only drawn up as proposed minutes of proposed meetings.

(Excused.)

TESTIMONY IN REBUTTAL.

E. Z. FERGUSON, recalled on behalf of plaintiffs testified as follows:

I heard the testimony of Mr. Hewitt when he stated he told me he didn't have power to make the sale of the land, but he never made that statement. He told me in the early part that one of the stockholders of the company named Lombard lived in the east, but when we made an agreement where I was to get the land I asked Mr. Hewitt about getting a meeting of the directors, and he said "Oh, the whole thing is with me. Whatever I say goes." And I said "Well, you will have to communicate with that party in the east" and he said, "No, he is out of it. The whole of the stock is owned right here by myself and my son," and he may possibly have said his wife; it was all in the family. The deed was on a regular corporation form and was regular in all respects with the exception of the error in description. In examining the deed, we were all quite satisfied that it was a deed made with copying ink and that a press copy had been taken of it. It bore that appearance and we were all satisfied that that had been the case. Regarding the valuation of those lands, we bought something like seven or eight thousand acres and at that time we had not paid anybody over $15 an acre. Nearly all was bought for less than $12.50 and some as low as $1000 a claim, within a few months preceding, and the price offered Mr. Hewitt was considerably in excess of anything else we had paid in that neighborhood. I know timber through the Nehalem Valley was rated along those lines at that time but it raised after that quite rap-

idly and was raising all the time in 1906 and 1907. Timber went up very rapid during 1906. I bought and sold a great deal of timber in that vicinity. I bought five claims for $5,000 and sold those five claims before the fall of 1907 for five times that. Timber went up very rapidly after this deal was made, but at the time we purchased this land, $20 an acre was an extra high price for it.

Cross Examination.

The price of this land had advanced considerably before this suit was begun. The timber, today, on those four claims involved in this suit would be worth anyhow $40,000, possibly more.

After argument of the case by counsel the witness E. Z. Ferguson was recalled by plaintiffs and testified:

I think I requested Mr. Hewitt to send the deed to the Astoria National Bank. This request was made when I was in Tacoma at the time we made the bargain for the lands; he said he would have it fixed up and have a meeting of the board of directors and he told me he was the whole thing; that he and his son owned all the stock. I told him the abstracts would have to be made and if we found the title was all right we would pay the money.

Cross Examination.

I don't know as there was any special agreement as to the conditions under which the money was to be paid into the bank. Mr. Hewitt was to send the deed over, we would have the abstract of title made, and when the

title was perfect we would pay the money and take the deed.

DEPOSITION OF HENRY HEWITT JR.

HENRY HEWITT Jr., called as a witness on behalf of plaintiffs, testified as follows:

Direct Examination.

My name is Henry Hewitt Jr.; I reside in Tacoma, age 71. Was president of the Hewitt Investment Company, defendant in this suit, in 1905 and 1906, and am still president. I had some correspondence with E. Z. Ferguson in 1905 and 1906, relative to the sale of the lands involved in this suit, but we made the trade verbally in Tacoma, some time before the deed was made. Under the agreement I made, I was to trade and procure a deed and send to the bank in Oregon. I refer to the deed sent to the Astoria National Bank, conveying to Ferguson these lands. I got the deed back, but do not know where it is now, it was destroyed, I think. I have not seen it for four or five years. I destroyed it, or threw it away, or something; I did not deliver it to anybody.

This letter handed me, dated June 5th, 1906, signed by Henry Hewitt Jr., is in my handwriting, signed by me; it was written in regard to the general trade and sale and agreement I had with him, in regard to the lands in controversy and other lands.

Plaintiffs offered the letter in evidence.

Defendant objected, on the ground that it is incompetent, irrelevant and immaterial, and is a letter written

subsequent to the alleged agreement of sale, and subsequent to the withdrawal of the proposition of sale, and after all matters connected with the proposed sale had been withdrawn.

Letter marked "Plaintiffs' Exhibit A."

In 1905 and 1906 the Hewitt Investment Company was constituted of myself, my son, Mr. Norton, and a man from Boston, I do not recall his name. The capital stock of the corporation was $50,000, divided into 100 shares. Up to about that time myself and my son and Mrs. Norton owned about half. Mrs. Norton lives in Tacoma; Mr. Norton married my wife's sister. The other half was owned by a man in Boston, and he sold his half to a real estate man in Tacoma. We traded together, he owned half and I was to have half. The resident directors or trustees of the corporation were my wife, my son John and myself, and I am not sure but one of the representatives of the Boston man was too. There were 3 or 5 trustees, I would not be sure which. When this matter of making this deal with Ferguson came up, we had no meeting of the trustees, and did not discuss it with them; my son did not know anything about it, he was not here at the time; he was living with me at my house. My son John, who was a director, was also secretary of the corporation. The Boston man's name was Lombard. This book produced is the Secretary's record book. This book shows that the first meeting of the stockholders of the company was held in November, 1890. I think the corporation was organized about that time. There have been some meetings of the directors held; we do not hold them

probably as we ought to every month, or every year; sometimes we ran over a year. The corporation was engaged in business only in buying those lands in Oregon and some in Washington. This letter handed to me, dated December 22nd, 1905, signed Henry Hewitt, Jr., is in my writing. In this letter is stated: "We have today sent deed for lands to Astoria National Bank which they will deliver to you on payment of $12,800. I will send you a check for commissions when the money is received, of two and one-half per cent. Our directors would not allow more, and in fact did not like to deed the land at all." That was true, and more than true. They did not meet at all. I just talked to some of them and they kicked about giving the deed at all. I did not meet any of them, only myself and John.

Q. What did you mean by saying that your directors would not allow more than 2½ per cent?

A. I just made it up; I said that; it was not brought before them at all.

Q. You had not talked with them at all?

A. No.

Q. You had talked with your son John, hadn't you?

A. Not about the commission. No, I don't think I did at all. I had not talked with my son John about the sale of the land to Mr. Ferguson; I did afterwards get him by persuasion to sign the deed, on the ground that Ferguson was going to deed some other lands to us adjoining our other lands. He did join as Secretary in executing the deed by persuasion. I do not think the deed stated it was executed pursuant to a resolution of the board of directors; if it did say so, it was not true. We

have tried to find the deed. I presume the deed was executed under the corporate seal of the Company, which has a corporate seal.

Plaintiffs offered in evidence the letter of December 22, 1905, identified by the witness.

Defendant objected that it is incompetent, irrelevant and immaterial, to prove any issue in this cause, and does not constitute such a writing as will support this action.

Letter marked "Plaintiffs' Exhibit B," and attached to deposition.

The letter was written by me personally, and not by the Company. I did not assume to be the company. I was acting in good faith, if Ferguson had carried out his agreement I would have procured the agreement, right or wrong, from my people. I did procure the deed, but I did it wrongfully and ought not to have done it. I presume I sent the letter with the deed to the Astoria National Bank, but do not remember the date.

Plaintiffs offered in evidence a copy of a letter dated December 22, 1905, to the Astoria National Bank, signed Henry Hewitt Jr.

Defendant objected to the copy of letter offered, that it is not the original letter, the original is not accounted for, or its loss or destruction shown, and it is incompetent, irrelevant and immaterial, and the original letter is the best evidence.

Letter marked "Plaintiffs' Exhibit C," and attached to deposition.

Mr. Ferguson and I had considerable correspondence in 1905 and 1906 relative to this transaction.

Plaintiff offered in evidence a copy of a letter as follows:

"September 25th, 1905.

"Hewitt Investment Company, Tacoma, Washington,

Gentlemen: Your letter of recent date stating that you would not care to trade your lands, but that you would sell them all for twenty dollars per acre, received, but in reply I have to say that there seems to be a very poor prospect of making a sale of this tract at the present time. Timber buying has dropped off, and there is practically no timber changing hands. It may be better after a while. I am authorized to offer you $8,000 for the four claims in 6-6. As you know one of these claims is partially burned. One of them is better than the average, and the other two are just about up to the average, in that part of the country, and the price offered you is more than has been paid anyone else in the township. The timber is mostly red and bastard fir, practically no yellow fir.

Yours Truly, E. Z. FERGUSON."

Defendant objected to the letter going into the record, and as evidence in the case, on the ground that it is not the basis of the alleged sale, and the original letter, if such letter was written, is the best evidence, and it is incompetent, irrelevant and immaterial.

The Witness: I may have received the letter, I remember receiving letters, but the whole letter is a lie on the face of it, because the timber was worth four times what he claimed there. No meetings of the stockholders or trustees of the Company were held between May 30, 1903 and May 29, 1909. The stockholders meeting dat-

ed May 29, 1909 was not held, and the resolution shown in the minutes on page 42 was never adopted. If we had a meeting, the signature of the officers would be there, and these minutes are not signed. We had not been selling real estate, except a few small sales; we made a few sales in Washington, but none in Oregon; I could not tell when. I presume our attorney's attention was called to some sales, and he thought we ought to have some such resolution, but we never had such a meeting. The sales made were by deed executed in the name of the corporation, by myself as President and my son as Secretary. I think some small sales were negotiated by Mr. Seeley, who was a director, representing Mr. Lombard, who owned half of the property. My son, J. J. Hewitt, was Secretary of the Company on June 1st, 1903, and no meeting of the trustees was held after that date. No sales were made after June 1st, 1903, except some small sales; I can not recall any tracts sold in Washington after June 1st, 1903; I think the resolution proposed to ratify something sold previously without any meeting of the trustees being held. We really have unsold all those lands belonging to the Company, we did not convey any of any consequence. The Company owns five or six thousand acres, bought at different times, including the lands in Oregon. I think I was authorized by Lombard to buy any lands, and I submitted them to him, and if I got his favorable report I bought them. I think we held formal meetings on most of them. Mr. King and Mr. Seeley, kept track of that, they were Lombard's representatives. The lands were really bought by the others, and we got together and

recognized it. Mr. King bought a good share of the land. We bought these lands in 1890 and 3 or 4 year after that. The by-laws in the front of the record book are the by-laws of the Company. I have been president of the Company since its organization. We had a finance committee; Mr. King and myself did the financing for a long while, and he kept track of the lands. I bought any land which I thought I wanted to buy. I brought it up to Lombard's man, and the secretary and treasurer, and if we agreed upon the land, all right, and any that they did not want I kept myself. I always bought it in my own name, and did the transactions in the name of Henry Hewitt Jr., and not for the company. I think most of the lands were bought in my name, and then afterwards deeded to the company by consent and agreement, in case the company or committee approved.

Mr. FULTON: Q. Now after the organization of the corporation Mr. Lombard sold his interest out to somebody here?

A. Later on, yes, sir.

Q. When was it he sold, do you remember?

A. I do not know; I couldn't remember.

Q. To whom did he sell?

A. He sold some of the stock through Mr. King, to me, and as I remember, although I am not sure, then he sold the larger amount of the stock to Mr. Seeley.

Q. What Seeley?

A. Seeley the real estate man.

Q. Now then, have you any idea when that was?

A. No.

Q. How much did he sell to you?

A. About one thousand dollars worth, through Mr. King. That would be ten shares.

Q. You held 490 shares to start with?

A. I presume so; about half the stock.

Q. According to this record Henry Hewitt, Jr., 490, Lombard 490; A. N. Fitch, 5; and P. D. Norton 5, and Mr. King 10; at the organization meeting?

A. I think that is right.

Q. You afterwards purchased ten shares?

A. Yes, sir.

Q. And Mr. Seeley purchased the remaining shares of Mr. Lombard?

A. Yes.

Q. Does he still own them?

A. No, sir.

Q. Who owns them now?

A. I think I bought them of him.

Q. When did you buy them?

A. I couldn't tell you exactly, but two or three years ago.

Q. Have you the record of their sale to you?

A. I do not think so.

Q. Haven't you anything to show when you purchased them?

A. No. He got into trouble with his wife and came to me and sold them to me one day in a hurry; I bought them personally.

Q. So that made you the owner of practically all the shares of stock?

A. Oh, no.

Q. Who else owned any?

A. Mr. King owned his for awhile and Mr. Norton owned all of his, and had more than at first.

Q. Mr. King had ten and Norton five?

A. I think we issued more shares after that.

Q. Well this seems to make one thousand shares altogether?

A. We never put in but about fifty shares, and when we bought land we assessed, and the stock was issued.

Q. But at the first meeting you had 490 and Lombard 490.

A. Yes.

Q. And the others five and five and ten respectively, but subsequently Mr. Lombard sold to Mr. Seeley, and Mr. Seeley sold to you?

A. Yes, sir; I don't think we issued the others.

Q. But to start out with you and Lombard had equal shares?

A. Yes, sir.

Q. And you succeeded through sales to the interest of Lombard?

A. To all but ten shares I think.

Q. So that gave you practically all of the stock?

A. It was a pretty good strong majority.

Q. You got all of Mr. Lombard's excepting ten, and that would leave Mr. Fitch five, Norton five and King ten, and ten others, which would be thirty shares outstanding that you did not own, and all the rest you owned?

A. No, I sold to my wife and took some of her property, and I sold to my son John. I don't own it all. I don't know just how it stands.

Cross Examination.

No meeting was held on May 29th, 1909, by either the stockholders or trustees; no such resolution as shown in the minutes of that date was discussed or agreed upon by the stockholders or trustees to be adopted; it was only a proposition to hold a meeting and take action, which was never done. The Hewitt Investment Company was merely a holding company for timber lands, it has not done any business of buying or selling lands generally; it now holds practically all the lands which it has had. I bought the lands myself in my name, and if the finance committee agreed to it they took over any lands they wanted, we agreed upon the price, and I deeded to the company ,and any that they did not want I kept myself. Before the lands were taken or transferred to the company, they were approved by the finance committee or the officers and trustees of the company. The proposition of the sale of the lands involved in this suit was not submitted to the stockholders or trustees of the company; the trustees never took any action authorizing the sale; they knew nothing about it, except John, and I induced him to deed them by saying to him that Ferguson was going to deed me a great lot of other lands, of which he sent me a map, at fifty cents a thousand. It was a personal transaction between me and Ferguson. I proposed to take the lands, and deed them to the company in lieu of these lands. Ferguson furnished me a map, and told me to write the parties, and that he would see that I got the title. We wrote to the parties and tried to buy the lands, and they asked me twice what was agreed upon, and some of them three times. The whole in-

ducement to me to go into the transaction was not to sell the lands, but to buy lands adjoining other lands I had in Oregon; it was a trade to accommodate him and to accommodate me; it was with him personally; it was in the nature of a trade by which he was to purchase other lands at a fixed price; he was to take this same money and pay for the other lands. He did not do it; he told me he would, and fraudulently got me to sign the deed. The inducement to sign the deed was that he was going to give me more lands, about 300 or 400 acres or more, at fifty cents a thousand, adjoining other lands I had there. No consideration has been received by the Hewitt Investment Company for the deed sent to Astoria, or for the sale of the lands involved in this suit; no part of the proposed purchase price was paid to that company or to me personally. There was merely a verbal agreement of understanding between me and Ferguson regarding the proposed sale of the lands involved in this suit; I was then dealing with Ferguson as an individual; I had no dealings with the plaintiff, Minnesota & Oregon Land & Timber Company, nor any agreement with it for the sale of the lands, and Ferguson did not represent that he was dealing on behalf of that corporation. None of the money paid in to the Bank at Astoria by Ferguson was ever received by me or the Hewitt Investment Company; the bank never offered to pay over to me any of that money; it held the money because they claimed the deed was wrong and the Company had no legal right to sell any lands in Oregon, and the title was not good or satisfactory; Ferguson was up in Tacoma fixing up the title and claimed he would get me the other

lands he agreed to, but I never got them. The money paid to the Astoria bank was on the condition that it was to be paid over upon the showing that the title was perfect and to the satisfaction of Ferguson; the title was not then perfect and was not made perfect. The objections to the title were that Mr. Griggs did not have a power of attorney of record, and that we had no legal title to sell without filing our corporation articles in Oregon, and that Lockwood had not given any power of attorney; those objections were never corrected; we tried to correct part of them, but never organized in Oregon or filed records there. The money paid in to the Astoria bank was payable to the Hewitt Investment Company only on condition that the objections to the title were removed. I know the deed to Ferguson was not executed by authority of the Board of Trustees.

Re-direct Examination.

Ferguson wrote to me and talked to me in Tacoma that the lands he was to purchase and trade to me were selling for thirty cents and estimated so and so, and the fact was that they were not selling at that price and those estimates were twice what he said. He fraudulently represented that land was worth only thirty cents, and that he could buy the land for that. I remember his writing me what timber was worth, and his making me an offer of $8,000. He came up himself and induced me to have the deed executed, and he was going to get me the other land, and he never did, but wanted my deed, and never got the other land. It was a verbal agreement between him and me personally.

Re-cross Examination.

The lands Ferguson agreed to deliver to me, he was unable to procure and deliver in accordance with his agreement; they asked a dollar and a dollar and a half a thousand, instead of fifty cents. He sent a map of them which I tried to find, but could not. The agreement between myself and Ferguson was entirely oral, and whatever his letters might claim or my own might. Neither Ferguson or any one on his behalf prior to this suit offered to pay to me or the Hewitt Investment Company the consideration of $12,800 free of conditions; the conditions he asked were never performed, part of them we could not fulfill. I have been interested in the purchase and sale of timber lands in Washington and Oregon since 1888; I have had many transactions in billions of timber all told. I bought the lands involved in this suit, and those lands at the time of the transaction with Mr. Ferguson were worth $25,000. The inducement to me to make this sale or exchange with Ferguson was that I had another lot of land near Nehalem, where the railroads were near, and if I could make an exchange they were more available for me than the lands he wanted. Ferguson was supposed to know the value of the lands he was to procure, and from what he said they would be better for me than those, and he would get me twice as much of them, but he carried out his agreement in no respect whatever. I called on Ferguson to keep his agreement, and he failed to do so. The $12,800 paid in to the Astoria National Bank was not held or retained by the bank as my agent, and I never received any money from that bank. The reports made to me regarding

the money paid in to the bank were made by one of my cruisers who was down there talking to them, and the balance of it was by letter; I never met them. The money was held subject to conditions which I could not perform if I wanted to, and none of us have ever procured the title that they demanded or performed the conditions as to the title. The Hewitt Investment Company has paid the taxes on these lands for the year 1905 and since then to date.

Re-direct Examination.

The conditions imposed on us which we could not fulfill were to get a power of attorney from Mr. Griggs, and to get a deed from Lockwood, and to file our articles of incorporation in Oregon; they were not waived; the matter of filing articles or conforming to the law as to foreign corporations was not waived until after everything was cancelled and withdrawn, as I remember. I called on Ferguson to keep his agreement, both by letter and verbally when he was in Tacoma some months after that. We wrote to the bank and asked them to send the deed back; I thought Ferguson was going to be in Tacoma and would fix up the land matter; at that time I expected to have the deed corrected, if he did his part of it and was coming up to Tacoma to do it. Any waiver by Ferguson of the conditions as to the title was made after the deed had been returned and we ascertained he could not deliver the lands; I am positive of that, but I don't think he waived anything, because he came up and wrote after the deed was returned and this talk was afterwards.

DEPOSITION OF J. J. HEWITT.

J. J. HEWITT, called as a witness on behalf of plaintiffs, testified as follows:

Direct Examination.

I reside in Tacoma, Washington; age 37; am a son of Henry Hewitt Jr. Some of the stock of the Hewitt Investment Company is in my name and is my own, I could not tell how much. There are probably 5 or 6 stockholders in the Company; they are Henry Hewitt Jr., Rocena L. Hewitt, his wife, myself, the estate of P. D. Norton, and Mr. Seeley. I think the estate of Norton has 2 or 3 shares; I think Seeley had about $10,000, he sold out to my father, Henry Hewitt Jr. several years ago, guessing at it I would say about 4 or 5 years ago. I am secretary of the company, and have been secretary since the former secretary resigned. Since I became secretary I continued such to the present time, but we have never had anything to do in connection with the Company except to pay the taxes once a year. The company runs itself, it is a holding company, we never sold anything. I believe we did sell some land in King County but the taxes and everything have been paid by assessments; it is just a holding company. The only sale I remember was forty acres in King County. My father gave me the shares I have, I presume he put them in my name so I could hold the position of secretary. I remember signing a deed of lands to Ferguson, I don't remember when, and hardly remember the transaction at all; according to the by laws the secretary is supposed to sign. In a matter of policy whether a thing should be sold or not, my father always brought me in and asked

me what I thought about those things. When I came home from some trip after 2 or 3 months, he said here is a deed to be signed, and I said I didn't know anything about it. He said he had made some deal with Ferguson whereby he would get a lot of lands, and this was to be the other end of it. I left the determination of those matters to my father, and acted as he desired, as he has a majority or practically all of the stock. I do not know what became of the deed when it was returned to be corrected, I have not seen it since. I never saw the correspondence about it; I was not interested in it, as I had but a few shares and the rest had a lot more; I think mother had more than I, and Seeley had; he sold his stock to my father; and the Norton estate had some stock, I have forgotten how much. Norton had five shares to start with, but there were assessments on that stock for a number of years, and the stock was issued as the assessments were made; shares were issued, and they kept paying in on the assessments, and every time they made an assessment, stock was issued. The corporation provides for $100,000 of stock, in 1,000 shares. The first meeting of stockholders shows Henry Hewitt Jr. 490 shares, Lombard 490, A. N. Fitch 5, P. D. Norton 5, and S. S. King 10, but they might not get it on account of not paying for it; I don't know whether the certificates were issued. I have none of the correspondence in my possession; letters addressed to the company would come to the office and would be opened by anybody; my father took charge of these matters and everything was referred to him.

Cross-examination.

No meeting of the stockholders or trustees of the company has been held since the record of the meeting of June 1st, 1903, shown in the record book. No such meetings of the stockholders or trustees were held on May 29th, 1909, as shown by the minutes on pages 42 to 45 of the records of the secretary; the record book was turned over to Mr. York, our attorney, to bring the records up to date, and if they were approved, to sign them, but there were no such meetings held at all, and the stockholders or trustees were not gathered together for the purpose of holding any such meetings at or about May 29th, 1909. The company has been doing business about 25 years, and the only thing I know of their ever selling was a fractional forty over in King County. It was not really timber business, it was a clay bank and brick yard that they took in for some reason, and this man came along and wanted to buy it and they sold it.

That is the only sale the company made that I know of in 25 years, except a piece of land that was put into the company and taken right out, they just used the company as a matter of convenience. The company never received any consideration for the sale or the deed of the land to Ferguson so far as I know; the proposition to sell that land to Ferguson was not submitted by Henry Hewitt Jr. to any meeting of the trustees of the company; I was not authorized as secretary of the company to sign that deed, the records will show that. I never had any dealings with Ferguson personally about the matter of the sale and never heard of the Minnesota & Oregon Land & Timber Company until today; I had

no knowledge that they were interested in the land, and had no dealings with that corporation personally or as secretary of the Hewitt Investment Co.

Re-direct Examination.

No action was taken by the trustees of the Hewitt Investment Company authorizing or empowering me to execute the Ferguson deed; I signed it because when I came home after two or three months, Mr. Hewitt my father said here is a deed to sign; he was president of the company; I asked him what it was and he said he had a deal on with Ferguson to trade lands, and I signed the deed, and it was sent off down there, and the next thing I knew the deed came back for correction of the title or something, and the matter so far as I was concerned was dropped. I think the other director then beside myself and my father, was Rocena L. Hewitt, my mother; I think there were but three directors at that time.

The foregoing statement of the testimony and evidence admitted on the trial, for use on the appeal herein, is hereby approved this 28th day of March, 1913.

CHAS. E. WOLVERTON,
Judge.

[Endorsed]: Condensed statement of evidence. Filed March 26, 1913.

A. M. CANNON,
Clerk U. S. District Court.

[Defendant's Exhibit D.]

BY LAWS OF THE HEWITT INVESTMENT COMPANY.

Art. 1. The officers of this corporation shall be a President, Vice President, Secretary and Treasurer, whose term office, except as provided in Art. 2., shall be one year, or, until their successors are elected and qualified.

Art. 2. The officers elected at the first meeting of the trustees shall hold their respective offices until the 29th day of May, 1891, or, until their successors are elected and qualified.

Art. 3. The annual meeting of stock-holders shall be held on the last Saturday in May of each year.

Art. 4. The Board of Trustees shall consist of five, to be elected from among stock-holders, said Board to be elected at the annual meeting of the stock-holders.

Art. 5. Each stock-holder shall be entitled to a vote for each share of stock held by him, and it shall be necessary for a majority of all the stock to be present and voting, either in person or by proxy, for the transaction of business.

Art. 6. Immediately after their election the Board of trustees shall meet and elect the officers of the corporation for the ensuing year.

Art. 7. The President shall preside at all the meetings of the Board of Trustees; sign all notes or evidence of indebtedness, deeds, mortgages and all other legal papers of the corporation. He shall be the General Manager of the Corporation, with full power to buy Real estate, notes, bonds or other evidences of indebtedness

or anything which the Company is authorized to hold, buy and sell, subject to the approval of the Finance committee, of which he shall be chairman.

Art. 8. The Vice President shall perform all the duties of the President—during his absence, or inability to attend to the duties of his office, and while performing such duties sign any and all papers with equal power as the President.

Art. 9. The Secretary shall attest all papers signed by the President or Vice President, and attach thereto the Seal of the Company, of which he shall be the custodian. He shall report to the stock-holders at their annual meeting, and to the trustees when requested.

Art. 10. The Treasurer shall be the custodian of the funds of the corporation, and shall make a report to the stock-holders of the corporation at the annual meeting, and to the trustees when required.

Art. 11. The Finance committee shall consist of the President and two other members of the Board of Trustees, to be appointed by him, and their duties shall be to advise with and approve the purchases and sales made by the Presidenlt, and to audit the accounts of the Secretary and Treasurer from time to time, and report to the full Board.

Art. 12. The regular meetings of the Board of Trustees shall be held at the time and place of meeting of the stock-holders, but special meetings may be called by the President at his pleasure, or by a written request of any two of the members of the Board; and at all special meetings of the Board any business may be

transacted that may be transacted at the regular meetings.

Art. 13. These By Laws may be amended at any meeting, whether regular or special, by a vote of a majority of the Board.

[Defendant's Exhibit D-2.]

Tacoma, Wash., November 28th, 1890.

At the First meeting of the Stockholders of the Hewitt Investment Company, this day held at the Office of The Traders' Bank in the City of Tacoma, Washington, the Stock being present and represented as follows:—

Henry Hewitt, Jr.....490 shares
B. Lombard, Jr.....490 " by proxy S. S. King.
A. N. Fitch ..... 5 "
P. D. Norton ..... 5 "
S. S. King ..... 10 "

the following proceedings were had, to-wit:—

Mr. Henry Hewitt, Jr., elected temporary Chairman.

Mr. S. S. King elected temporary Secretary.

A set of "By Laws" having been prepared by S. S. King and A. N. Fitch, were read and approved and adopted as read

On motion of S. S. King, Henry Hewitt, Jr., was elected President. B. Lambard, Jr., Vice President. On motion of A. N. Fitch, S. S. King was elected Secretary and on motion of P. D. Norton, A. N. Fitch was elected Treasurer.

The following resolution was presented by A. N. Fitch, and adopted.

Whereas. Mr. Henry Hewitt, Jr., is the owner of

certain lands described as follows:

Lot 2, Sec. 2, Tp. 22 North Range 2 East, South West Quarter of North West Quarter and N. W. ¼ of S. E. ¼ and S. 2 of S. W. ¼ of Section 2, Townp. 14, North Range 4 West, Lot 11, Sec. 13, Lots 1 and 5 and S. 2 of N. E. ¼ and S. 2 of Sec. 24, and N. 2 of N. E. and S. W. ¼ of N. E. ¼ and N. W. ¼ of S. E. ¼ of Sec. 25, Township 38, North, Range 5 East, The S. E. ¼ of N. E. ¼ and E2 of S. E. ¼ and S. W. ¼ of S. E. ¼ of Sec. 2 Township 14, North of Range 4 West and S. 2 of N. W. ¼ and N. 2 of S. W. ¼ of Sec. 22 and S. W. ¼ of N. E. ¼ and N. 2 of S. E. ¼ and S. W. ¼ of S. E. ¼ and S. W. ¼ Sec. 20 and S. E. ¼ of Sec. 30 all Township 14 North of Range 4 West, and Lots 1-2-3-4 and S. 2 of N. 2 and S. W. ¼ of Sec. 2 Township 13 North of Range 1 East and part of Lots 7 and 8 Sec. 18 and part of Lot 4 Sec. 19, township 14 North Rg. 2 West, and

Whereas he has offered to this Company the above described lands, for the sum of Twenty two Thousand Four Hundred and Thirty-five Dollars ($22435.00) same being in full payment, excepting one item of Eight Hundred and Fifty ($850.00) Dollars still due on one tract and

Whereas, it is the sense of this meeting be accepted, it is therefore

Resolved, that this Company purchase from Henry Hewitt, Jr., the above described lands, at the price above named and that the Officers be and they are hereby authorized and empowered to consummate the purchase and Transfer of said lands.

On motion of A. N. Fitch it was resolved that an assessment of Twenty-five (25) per cent of the Capital Stock of the Company be made, and that the same be payable on or before the first day of February, 1891.

The President appointed the following Finance Committee, to act with himself as such until the next annual meeting. B. Lombard, Jr. and S. S. King.

There being no farther business before the Trustees they adjourned subject to the call of the President.

S. S. KING, Secy.

[Defendant's Exhibit D-3.]

May 29th, 1891.

Newly elected Board of Trustees met in the Office of the Traders' Bank of Tacoma, and duly qualified, there being present in person Henry Hewitt, Jr., A. N. Fitch, P. D. Norton, and S. S. King.

A. N. Fitch was elected temporary Chairman.

S. S. King was elected temporary Secretary.

On motion Board proceeded to election of permanent Officers for the ensuing year. Vote resulting in the election of the following Officers

Henry Hewitt Jr. President.

B. Lombard, Jr. Vice President

A. N. Fitch Treasurer

S. S. King Secretary.

The President appointed, to act with himself as Chairman the following Finance Committee—

B. Lombard, Jr. and S. S. King.

On motion of A. N. Fitch the Finance Committee was authorized to purchase or contract to purchase or sell

any lands they might deem advisable.

On motion an assessment of 5 per cent on capital stock was called.

On motion Trustees adjourned subject to call of the President.

S. S. KING, Secy.

[Defendant's Exhibit D-4.]

Tacoma, Washington, January 2nd, 1901.

At a Meeting of the Board of Trustees of the Hewitt Investment Company, this day held, at which were present, Henry Hewitt, Jr., John J. Hewitt and C. M. Riddell; the Secretary being absent, on motion C. M. Riddell was duly elected Secretary protem. The resignation of Leonard Howarth, the Secretary and Treasurer of said Company was tendered to said Trustees. Upon motion of C. M. Riddell the same was accepted and ordered filed. The vacancy having in this manner occurred as to the Secretary and Treasurer of this Company, the Board proceeded to the election of Secretary and Treasurer, John J. Hewitt being nominated and there being no further nomination, on motion of C. M. Riddell the election of John J. Hewitt was made unanimous.

The President of said Company having submitted a proposition from L. Gerlinger to lease the West half of Sec. 2, and the N. E. of Sec. 2 Township 13, Range 1, West in Lewis County, State of Washington, for a term of Twenty (20) years, beginning January 2nd, 1901; and agreeing to pay therefor an annual rental in royalties of Ten (10) cents per ton for Bituminous Coal, and Five (5) cents per ton for Lignite Coal; but, agree-

ing in any event whether coal is mined from said premises to pay an annual rental of Seven hundred and fifty ($750.00) Dollars, the Seven hundred and fifty ($750.00) Dollars rental beginning on the 2nd day of July, 1902, and agreeing to pay the sum of One Hundred and fifty ($150.00) Dollars as rental from the 2nd day of January, 1901 up and to July 2nd, 1902.

Upon Motion it was resolved that said proposition be accepted and the President of this Company is authorized and directed to enter into a written contract or lease for the time and under the terms as specified in the above proposition to execute the same in the Company's behalf. Upon Motion the meeting adjourned.

HENRY HEWITT, Jr.
President.
C. M. RIDDELL.
Secretary.

[Defendant's Exhibit D-5.]

Tacoma, Wn. May 31st, 1902.

Pursuant to previous notice given, the regular annual meeting of the stockholders of the Hewitt Investment Company met at the office of the Company at the City of Tacoma, Washington on Saturday, May 31st, 1902, at the hour of 2 o'clock p. m.

The meeting was called to order by President Henry Hewitt Jr., J. J. Hewitt, the company's Secretary acted as Secretary.

By direction of the President, the Secretary polled the stock of the Company. The same being done, the following stockholders were found to be present either in person or by proxy, to-wit:—

Henry Hewitt, Jr. ..... 490 Shares
J. J. Hewitt ..... 2 Shares
C. M. Riddell ..... 1 Share
Mrs. R. M. Lombard by C. M. Riddell
proxy ..... 490 Shares
R. L. Hewitt by Henry Hewitt Jr. proxy Shares

The result being announced the President declared there was a quorum present for the transaction of business.

The minutes of the previous stockholders meeting was ordered read. The same being read was duly approved as read.

The President then made a statement of the condition of the Company's property and mentioned the fact that certain of the Company property, a saw mill site on the Chehalis River between the towns of Chehalis and Centralia, on which the taxes had not been paid since 1895 on account of over valuation and assessment had been adjusted and paid in the sum of $494.05 and that such action should be approved and ratified at this meeting and there should also be an assessment made of one per cent. on all the stock of the Company to meet and pay off all taxes against the Company's property.

On motion duly made and seconded, an approval and ratification of the President's act in paying the taxes on the mill site, and ordering that he be reimbursed to the amount paid, was carried unanimously.

C. M. Riddell then offered the following resolution:

Resolved that an assessment is hereby made of one per cent. upon all the stock of the Company for the purpose of paying all taxes upon the Company's property,

the same being duly seconded a vote was ordered taken by poll of the stock, which being done resulted in a unanimous vote in favor of the resolution.

The President then announced the nomination and election of a new Board of Trustees of the Company was in order. After the usual order of nominations and voting the following persons received a majority vote of the stock, and was declared elected as Trustees of the Company to serve for one year or until their successors were duly elected and qualified, to-wit: Henry Hewitt, Jr., C. M. Riddell, J. J. Hewitt, R. L. Hewitt and R. M. Lombard.

There being no further business before the meeting on motion the same adjourned.

J. J. HEWITT,
Secretary.

[Defendant's Exhibit D-6.]

Pursuant to notice given the stockholders of the Hewitt Investment Company met at the office of the Company, 744 Pacific Ave. in the City of Tacoma, Washington, on Saturday May 30th, 1903, at the hour of 2 o'clock P. M. The day being memorial day and a legal holiday, on motion the meeting was adjourned to meet on Monday evening, June 1st, 1903, at 7 o'clock P. M. at the corner of North 4th and E. Streets, No. 401, at which time the meeting was called to order by President Henry Hewitt, Jr. J. J. Hewitt the Company's Secretary acted as Secretary.

The Roll Call of stockholders being ordered and the same being taken it was declared that more than a majority of all stockholders were present, either in per-

son or by his or her duly credited proxy, therefore a quorum, for the transaction of business.

The minutes of the previous meeting of the stockholders was ordered read, the same being read was duly approved as read.

The Secretary-Treasurer reported that he had not his report quite completed but would soon have which would show the receipt and disbursement received and made for and in behalf of the Company since its last meeting. He stated that all taxes that were due against the property of the Company for the past year had been paid and reecipt for same was on file in his office.

The Secretary further stated the sum of $780.72 was received from land sold by the Company to A. J. Hayward, which sum would be more and sufficient to pay all taxes and other necessary and current expenses, therefore it would not be necessary to levy an assessment on the stock this year for the payment of any taxes.

The President then made some statements in regard to the property of the Company, as to its value and condition, saying it was unfortunate that the land did not lie more in one body but that it was much scattered over a large territory and stated that all the stockholders should confer and ascertain what price such land should bring at the present time and set a price the Company would be willing to take in case an offer for same should be presented.

The election of a new Board of Trustees being then in order the following persons were nominated, to-wit:— Henry Hewitt, Jr., R. M. Lombard, C. M. Seeley, J. J. Hewitt and R. L. Hewitt. There being no oth-

er nominations by motion it was decided the rules be suspended and that the Secretary be instructed to cast the vote of all stockholders present for such person for Trustee of this Company for the ensuing year and until their successor was elected and qualified. The vote being cast Henry Hewitt, Jr., R. M. Lombard, C. M. Seeley, J. J. Hewitt and R. L. Hewitt were declared the duly elected trustees of the Company.

There being no further business before the meeting on motion the same adjourned.

J. J. HEWITT,
Secretary.

And afterwards, to wit, on the 19 day of February 1913, there was duly filed in said Court, a Petition and Order for Appeal in words and figures as follows, to wit:

[Petition and Order for Appeal.]

In the District Court of the United States for the District of Oregon.

MINNESOTA AND OREGON LAND AND TIMBER COMPANY, a corporation, and E. Z. FERGUSON,

Plaintiffs,

vs.

HEWITT INVESTMENT COMPANY, a corporation,

Defendant.

To the Hon. CHARLES E. WOLVERTON, Judge of said Court:

Your petitioner, Hewitt Investment Company, the

defendant in the above entitled cause, conceiving itself aggrieved by the judgment and decree rendered and entered by the above entitled court in the above entitled cause on the 3rd day of February, 1913, and believing that said judgment and decree is greatly to its prejudice and injury and is erroneous and inequitable, does hereby appeal from said judgment and decree to the United States Circuit Court of Appeals for the Ninth Circuit, and particularly from that portion of said judgment and decree whereby it is adjudged and decreed that your petitioner execute and deliver to the plaintiff, Minnesota and Oregon Land and Timber Company, a corporation, a deed of conveyance of the title to the land involved in this cause and appointing and authorizing a Commissioner of said court to execute and deliver such deed if your petitioner should fail so to do, for the reasons and upon the grounds specified in the assignment of errors which is filed herewith.

Wherefore, Your petitioner prays that its petition for said appeal may be allowed, and that a transcript of the record, proceedings and papers in said cause on which said judgment and decree was rendered and entered, may be duly authenticated and sent to said United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 19th day of February, 1913.

E. R. YORK,
Attorney for Defendant,
Hewitt Investment Company.

[Order Allowing Appeal and Fixing Supersedeas Bond.]

The foregoing petition for appeal is hereby granted,

and the claim of appeal therein made is hereby allowed, and the amount of the bond on said appeal and to supersede and stay proceedings on said judgment and decree appealed from is fixed at the sum of ..... Dollars.

Dated, this 19 day of February, 1913.

R. S. BEAN,
District Judge.

[Endorsed]: Petition for Appeal and Order Allowing Appeal.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 19 day of February 1913, there was duly filed in said Court, Assignments of Error in words and figures as follows, to wit:

[Assignments of Error.]

In the District Court of the United States for the District of Oregon.

MINNESOTA AND OREGON LAND AND TIMBER COMPANY, a corporation, and E. Z. FERGUSON,

Plaintiffs,

vs.

HEWITT INVESTMENT COMPANY, a corporation,

Defendant.

Comes now the defendant, Hewitt Investment Company, and upon its appeal herein makes and files this assignment of errors upon which it will rely on said appeal:

1st. The court erred in overruling defendant's general objection made upon the trial to the admission of any and all parol evidence to establish the contract of sale alleged, for the reason that all such evidence is incompetent and inadmissible to prove such contract or any valid contract of sale of land under the statute.

2nd. The court erred in overruling defendant's objection and admitting in evidence the letter marked "plaintiffs' exhibit 1", for the reason that said letter is incompetent and inadmissible to prove the contract of sale alleged or any valid contract of sale of land under the statute or any escrow thereof.

3d. The court erred in overruling defendant's objection and admitting in evidence the letter marked "Plaintiffs' Exhibit 2", for the same reasons as stated in assignment 2nd.

4th. The court erred in overruling defendant's objection and admitting in evidence the letter marked "Plaintiffs' Exhibit 3", for the same reasons as stated in assignment 2nd.

5th. The court erred in overruling defendant's objection and admitting in evidence the letter marked "Plaintiffs' Exhibit 4", for the same reasons as stated in assignment 2nd.

6th. The court erred in overruling defendant's objection and admitting in evidence the letter from the Astoria National Bank to the Hewitt Investment Company, dated January 9th, 1906, for the same reasons as stated in assignment 2nd.

7th. The court erred in overruling defendant's objection and admitting in evidence the letter marked

"Plaintiffs' Exhibit 5," for the same reasons as stated in assignment 2nd.

8th. The court erred in overruling defendant's objection and admitting in evidence the letter marked "Plaintiffs' Exhibit 6," for the same reasons as stated in assignment 2nd.

9th. The court erred in overruling defendant's objection and admitting in evidence the letter marked "Plaintiffs' Exhibit 7," for the same reasons as stated in assignment 2nd.

10th. The court erred in overruling defendant's objection and admitting in evidence the letter marked "Plaintiffs' Exhibit A," attached to deposition of Henry Hewitt Jr., for the same reasons as stated in assignment 2nd.

11th. The court erred in overruling defendant's objection and admitting in evidence the letter marked "Plaintiffs' Exhibit B," attached to deposition of Henry Hewitt Jr., for the same reasons as stated in assignment 2nd.

12th. The court erred in denying defendant's motion for a non-suit and dismissal of the suit, made at the close of plaintiffs' case, for the reason that the evidence introduced by plaintiffs was insufficient to establish a valid contract of sale, or any title in plaintiffs to the land, or to entitle plaintiffs to the relief prayed or any relief herein.

13th. The court erred in its finding and decision that there was no definite parol agreement that Ferguson should procure other lands for purchase by defendant in trade and as part consideration for the alleged agree-

ment to sell and convey to Ferguson the lands involved in this suit.

14th. The court erred in its finding and decision that the alleged oral agreement and letters relating thereto constituted a valid or enforcible contract in writing for the sale of the lands involved herein, which a court of equity will require to be specifically performed.

15th. The court erred in its finding and decision that the deed sent to the Astoria National Bank constituted an agreement in writing for the sale of the lands involved in this suit, such as is required by the statute of frauds respecting the sale of lands.

16th. The court erred in its finding and decision that the deed sent to the Astoria National Bank was deposited in said bank as an escrow.

17th. The court erred in its finding and decision that Henry Hewitt Jr., as President, and the Secretary, of the defendant corporation were authorized or had power to execute the deed of conveyance of the lands to Ferguson.

18th. The court erred in its finding and decision that plaintiffs are entitled to a decree requiring the defendant to convey the lands to plaintiffs or either of them.

19th. The court erred in rendering the judgment and decree entered herein that the defendant execute and deliver to the plaintiff, Minnesota & Oregon Land & Timber Company, a conveyance of the title to the lands involved herein, and appointing and authorizing a commissioner of said court to execute and deliver such

deed if the defendant should fail so to do, for the reason that such portions of said judgment and decree are not justified or supported by, but are contrary to, the evidence, and that upon the evidence plaintiffs are not entitled to specific performance of the contract alleged, or to be decreed the title to said lands, or to have any relief herein.

Wherefore, Defendant prays for the reversal of said judgment and decree, and for the dismissal of this cause, with its costs.

E. R. YORK,
Attorney for Defendant,
Hewitt Investment Company.

[Endorsed]: Assignment of Errors. Filed Feb. 19, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 19 day of February, 1913, there was duly filed in said Court, a Bond on Appeal in words and figures as follows, to wit:

[Bond on Appeal.]

In the District Court of the United States for the District of Oregon.

MINNESOTA AND OREGON LAND & TIMBER COMPANY, a corporation, and E. Z. FERGUson,

Plaintiffs,

vs.

HEWITT INVESTMENT COMPANY, a corporation,

Defendant.

KNOW ALL MEN BY THESE PRESENTS: That we, Hewitt Investment Company, a corporation, organized and existing under the laws of the State of Washington, as principal, and The Title Guaranty and Surety Company of Scranton, Pennsylvania, as surety, are held and firmly bound unto the Minnesota and Oregon Land & Timber Company, a corporation, and E. Z. Ferguson, the plaintiffs in the above entitled cause, in the sum of Two Thousand and no-100 Dollars ($2000.00), lawful money of the United States, to be paid to the said Minnesota and Oregon Land & Timber Company and E. Z. Ferguson, for which payment well and truly to be made we hereby bind ourselves, our successors, heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 19th day of February, 1913.

The condition of this obligation is such that

Whereas a judgment and decree was made, rendered and entered by the above entitled court in the above entitled cause on the 3d day of February, 1913, wherein and whereby said court adjudged and decreed that said defendant execute and deliver to the plaintiff Minnesota and Oregon Land & Timber Company, a corporation, a deed of conveyance of the title to the land involved in this cause, and appointing and authorizing a commissioner of said court to execute and deliver such deed if said defendant should fail so to do, and said Hewitt Investment Company has petitioned for and obtained an order allowing an appeal from said judgment and decree to the United States Circuit Court of

Appeals for the 9th Circuit, and desires to supersede and stay proceedings upon said judgment and decree, and a citation directed to said plaintiffs is about to be issued citing and admonishing them to be and appear in the said United States Circuit Court of Appeals for the 9th Circuit, upon said appeal:

Now, therefore, if the said Hewitt Investment Company shall prosecute its said appeal to effect, and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation shall be void, otherwise to remain in full force and effect.

HEWITT INVESTMENT COMPANY,
(Seal) By HENRY HEWITT,
Its President.

Attest:
J. J. HEWITT,
Its Secretary.

THE TITLE GUARANTY AND SURETY COMPANY,
By A. EDWARD KRULL,
Its Attorney in Fact.
By A. EDWARD KRULL,
Agent.

The foregoing bond with the surety thereon is hereby approved this 19th day of February, 1913.

R. S. BEAN,
Judge.

[Endorsed]: Bond on Appeal. Filed Feb. 19, 1913.
A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 19 day of February, 1913, there was duly filed in said Court, a Citation on Appeal in words and figures as follows, to wit:

[Citation on Appeal.]

UNITED STATES OF AMERICA,
District of Oregon—ss.

To Minnesota and Oregon Land and Timber Company, a corporation, and E. Z. Ferguson, Greeting:

WHEREAS, Hewitt Investment Company, a corporation, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law; You Are, therefore, hereby, cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 19th day of February in the year of our Lord, one thousand, nine hundred and thirteen.

R. S. BEAN,
Judge.

Service of the within Citation on Appeal, by receipt of a true copy thereof, is hereby admitted this 19th day of February, 1913.

C. W. FULTON,
Attorney for Plaintiffs,
Minnesota and Oregon Land and Timber Co. and E. Z. Ferguson.

[Endorsed]: Citation on Appeal. Filed Feby. 19, 1913.

A. M. CANNON,
Clerk.

And afterwards, to wit, on Tuesday, the 8 day of April, 1913, the same being the 31 Judicial day of the Regular March 1913 Term of said Court; Present: the Honorable CHAS. E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Certifying up Original Exhibits.]

In the District Court of the United States for the District of Oregon.

MINNESOTA & OREGON LAND & TIMBER CO.,

v.

HEWITT INVESTMENT COMPANY.

It appearing to the Court that certain exhibits introduced in evidence on trial of this cause should be inspected by the appellate Court on the appeal of this cause, it is Ordered that defendant's exhibits G-G2-G3-G4-G5-G6- and G7 be certified up with the record by the Clerk of this Court to the United States Circuit Court of Appeals Ninth Circuit.

CHAS. E. WOLVERTON,
Judge.

And afterwards, to wit, on Saturday, the 15 day of March, 1913, the same being the 12 Judicial day of the Regular March Term of said Court; Present:

the Honorable CHAS. E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Enlarging Time to File Transcript.]

In the District Court of the United States for the District of Oregon.

No. 3125.

MINNESOTA AND OREGON LAND AND TIMBER COMPANY, a corporation, and E. Z. FERGUSON,

Plaintiffs,

v.

HEWITT INVESTMENT COMPANY, a corporation,

Defendant.

Upon application of the attorneys for the plaintiffs and defendant, and for sufficient cause shown to the Court, it is hereby ordered that the time within which the defendant shall prepare and file its transcript upon the appeal of this cause to the United States Court of Appeals for the Ninth Circuit, be and is hereby extended for the additional period of sixty days, to-wit, until May 19, 1913.

CHAS. E. WOLVERTON,
Judge.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

HEWITT INVESTMENT COMPANY, a corporation,
Appellant,

vs.

MINNESOTA AND OREGON LAND AND TIMBER COMPANY, a corporation, and E. Z. FERGUSON,
Appellees.

No.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

BRIEF OF APPELLANT

STATEMENT OF THE CASE.

By bill in equity, appellees ask a decree either (1) adjudging appellee Minnesota and Oregon Land and Timber Company the owner of certain lands, or (2) compelling specific performance of an alleged contract to sell and convey the same.

Briefly stated, the bill alleges that the appellee corporation is organized under the laws of Minnesota; that appellant is a corporation organized under the laws of Washington; that the lands involved are all in Clatsop county, Oregon; that, in December, 1905, appellees desired and agreed to purchase the land for the Minnesota corporation, taking the legal title in appellee Ferguson; that appellant owned the land and was desirous of selling it; that an agreement was made between Ferguson and appellant whereby it was agreed appellant would sell the land to Ferguson for $12,800, and would convey it "by a deed of the kind hereinafter mentioned, barring the error therein;" that appellant would make and deliver such deed to the Astoria National bank to be held by it in escrow and to be delivered to Ferguson on payment of the purchase price; that said agreement was in writing; that appellant knew that Ferguson was buying the land for the Minnesota corporation; that, thereafter, appellant executed a deed to the land and, on December 22, 1905, delivered the same to the bank to hold in escrow, and instructed the bank to deliver it to Ferguson on payment of the money; that such deed contained covenants of warranty; that, while otherwise in proper form, by inadvertence, the lands were described as being in township 6 south instead of 6 north; that the lands were described as being in Clatsop county, Oregon, all the townships of which were north of the government base line; that, on

January 3, 1906, Ferguson paid the money to the bank and the bank accepted it for appellant; that, thereby, appellees fully performed the conditions of the escrow and became the owners of the land "in fee"; that by the agreement, and the terms and conditions of the escrow, appellant was to furnish and convey to Ferguson a clear, valid record and marketable title to the land; that, about the time he paid the money to the bank, Ferguson discovered the mistake in the description of the land in the deed and requested appellant to correct it; that appellant agreed to do so and requested Ferguson to consent to a delivery of the deed to Henry Hewitt, Jr., president of appellant, for the purpose of having it corrected and returned to the bank; that, relying on that agreement, Ferguson consented; that neither of the appellees have ever consented that the deed be taken from the bank except for the purpose of correcting it; that the Minnesota corporation furnished the money to purchase the land; that appellant was the owner and is still the owner of the land, unless appellees became the owners on payment of the purchase price; that appellees believe that, ever since such payment, they have been the owners, Ferguson holding the naked legal title; that appellant wrongfully claims to be the owner of the land; that both parties intended that the deed should correctly describe the land, and appellees were not responsible for the mistake in it; that appellant has failed to correct the deed or to return it to the bank or to de-

liver it to appellees or either of them, and has refused and still refuses to do so; that appellees are and at all times have been ready and willing to pay over the purchase price of the land upon the execution and delivery to said Ferguson of a deed of conveyance of the land, or upon correction and redelivery to him of the deed withdrawn from the bank, and, since the payment of the money to the bank, have at various times notified appellant that they were willing to do so, but appellant has refused and refuses so to do; that, prior to beginning the action, appellees tendered and offered to pay $12,800 to appellant if it would either correct the deed and redeliver it, or execute a new deed to Ferguson; but appellant refused and refuses to do either, and appellees accordingly bring the money into court to be paid over to appellant when a decree shall be entered vesting appellees or either of them with the title. (Transcript, 1-8).

All these allegations were denied by the answer of appellant, except that the following facts were admitted:

That appellant is a corporation organized under the laws of Washington; that the lands described in the bill are in Clatsop county, Oregon; that, on December 22, 1905, in conformity with an "oral understanding" between Ferguson and Henry Hewitt, Jr., upon representations made by Hewitt to appellant that Ferguson could and would procure and

convey to appellant in exchange for its lands certain other lands adjoining lands owned by appellant in Columbia county, Oregon, appellant signed a deed of conveyance to Ferguson; that such deed was mailed to the Astoria National Bank for delivery to Ferguson upon payment by him to appellant of $12,800 net in Tacoma funds, and performance by Ferguson of the terms and conditions of his oral understanding with Hewitt, aforesaid, as part consideration for the conveyance; that Ferguson afterwards requested that appellant correct the deed; that appellant was and still is the owner of the land; that it has not corrected the deed or executed another, and has not delivered the deed to the bank or to appellees or to either of them, and has refused and refuses so to do.

The answer avers affirmatively that it has refused to convey the land for the reason that Ferguson did not at any time prior to the suit pay or tender to it the purchase price of the land, or keep or perform the conditions of the oral understanding between himself and Hewitt, which were the considerations agreed upon for conveyance of the land, viz: to procure and deliver to appellant the title to the other timber lands in Columbia county.

The allegations of the answer were put in issue by a reply.

A trial was had in the court below resulting in a decree requiring appellant to execute a deed to the

Minnesota and Oregon Land and Timber Company of certain particularly described lands, which deed "shall contain covenants" that the grantor is seized in fee simple, that the same are free from encumbrances, and that the grantor will warrant and defend the title thereto against the lawful claims of all persons whomsoever, beside other relief. (Transcript, 42). From that decree this appeal was taken and the cause is here for trial *de novo*.

The evidence and facts established by it will be best set forth in connection with the argument.

SPECIFICATION OF ERRORS RELIED ON AND DISCUSSED.

Appellant contends that the rulings of the trial court, and the decree entered thereon, are erroneous, in this:

1. That the evidence offered by appellees, and admitted over appellant's objection, was incompetent and insufficient to establish a valid contract of sale under the statute of frauds.

2. The written evidence admitted is incomplete, and does not contain all the writings between the parties relating to the contract alleged.

3. The evidence fails to show a meeting of the minds of the parties, or any mutual contract of sale.

4. The deed was not deposited in bank as an escrow.

5. Neither the contract of sale or deed was authorized by appellant corporation, nor made by any agent of appellant authorized thereto in writing.

6. To enforce specific performance would be grossly inequitable.

7. The decree entered is contrary to the law and the evidence.

ARGUMENT.

We propose to discuss the several points above specified in their order.

(I)

(A) THE DECREE IS BASED UPON INCOMPETENT EVIDENCE RECEIVED OVER THE OBJECTION OF APPELLANT MADE AT THE TIME.

At the opening of the trial, appellees offered in evidence a deposition of Henry Hewitt, Jr., whereupon the following occurred:

"The defendant objected to the testimony contained in the deposition on the ground that it is incompetent for the purpose of establishing a valid contract of purchase, under the statute of frauds, and as an attempt by this evidence to establish an agreement of sale of land by parol it is incompetent for such purpose.

"The Court: I think you can let it be understood that the objections are raised and that the court, without passing upon the objection, takes it under

consideration to be determined at the time of the final adjudication. * * It will be understood on this trial that all rulings are deemed excepted to by the party against whom the ruling is made." (Transcript, 45-46).

Later, E. Z. Ferguson, appellee, called by appellees, testified, and, during his examination, the following occurred:

"Q. When did these negotiations commence, Mr. Ferguson? Just tell how they commenced, and give a history of it.

"Mr. York: I think, at this time, * * * I want to object to any and all testimony by way of oral evidence which may be offered for the purpose of establishing a contract for the sale of the lands involved in this suit, upon the ground that any such testimony is incompetent for the purpose of proving or establishing a contract for the sale of lands under the statute. I make this objection at this time as a general objection, if the court will so consider it, to avoid making the objection from time to time. The court will understand that I make it as a general objection to all testimony of this character.

"Mr. Fulton: I am willing it should be so understood.

"The Court: Very well. The court will take it under advisement as far as ruling on the objection is concerned. I suppose you want to show this testi-

mony for the purpose of connecting up this correspondence.

"Mr. Fulton: Yes, sir. The statute, of course, requires some note or memorandum to be made in writing expressing the consideration and describing the property. We claim we have all that, but we must connect it by the testimony.

"The Court: I understand the points made by both parties. I will allow the testimony to be received.

"Q. Just proceed, Mr. Ferguson, and tell your story of these negotiations—what you did." (Transcript, 57-58)

Thereupon the witness testified: "We agreed on a deal. The price for the lands was $20 per acre, for which they were offered by Mr. Hewitt, acting, as I understood, for the Hewitt Investment Company. * * I agreed to pay the $20 per acre. * * Mr. Hewitt didn't seem particularly anxious to sell, but * * we agreed that he would take the $12,800 * * for the four claims, and would send the deed to the Astoria National Bank. He told me that he would have the deed executed, and would send it over, and I was to go home * * and pay the money. (Transcript, 59). * * I informed Mr. Hewitt that the Minnesota and Oregon Land and Timber Company was purchasing the land * * that I was buying the lands for the company. (Transcript, 69-70). * * I think I requested Mr. Hewitt to send the deed to the Astoria National Bank. This request was made when

I was in Tacoma at the time we made the bargain for the lands; he said he would have it fixed up * *. I told him the abstracts would have to be made and if we found the title was all right we would pay the money." (Transcript, 125).

The admission of all such testimony was error, under the statute of frauds, and the rule as to contracts within the statute, that if the contract was not in writing, or if the writings are incomplete, indefinite, or deficient in some one or more of the essentials required to make out a valid contract, parol evidence can not be received to supply the defects, for this would be to do the very thing prohibited by the statute.

17 Cyc., 748 e.

Broadway Hospital vs. Decker, 92 Pac. Rep., 445 (Wash.).

Grafton vs. Cummings, 99 U. S., 100.

(B) THE EVIDENCE IS INSUFFICIENT TO ESTABLISH A VALID CONTRACT UNDER THE STATUTE OF FRAUDS.

The statute of Oregon reads:

"In the following cases the agreement is void, unless the same or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party to be charged, or by his lawfully authorized agent: * * An agreement * * for the sale of real property or of any interest therein. * * An agreement concerning real

property made by an agent of the party sought to be charged, unless the authority of the agent be in writing."

I Oregon Code, Sec. 797.

And, "*evidence, therefore, of the agreement shall not be received, other than in writing,* or secondary evidence of its contents * *."

Id.

Hence, if any contract such as equity will decree specifically performed has been established, its terms must be found in written evidence, subscribed by appellant, or its agent thereunto authorized in writing, unaided by the oral testimony of witnesses given at the trial.

This is the rule in Oregon, where the lands here involved are situate, and elsewhere:

Catterlin vs. Bush, 65 Pac. Rep., 1064 (Ore.);
Mossie vs. Cyrus, 119 Pac. Rep., 485 (Ore.);
Hartenbower vs. Uden, 90 N. E. Rep., 298 (Ills.);
Rahm vs. Klerner, 37 S. E. Rep., 293 (Va.);
Seymour vs. Oelrichs, 106 Pac. Rep., 91 (Cal.);
Shumway vs. Kitzman, 134 N. W. Rep., 320 (S. Da.);

and, tested by it, the proof fails in the case at bar in that

(a) The writings in evidence do not show the material terms of the contract alleged in the bill;

(b) The writings in evidence fail to show that the agent who assumed to act for appellant was authorized as required by the statute; and

(c) The evidence shows that writings necessary to a full understanding of the real terms of the agreement have been suppressed by appellees and it is impossible to ascertain from those adduced at the trial what the contract was.

(a)

The Terms of the Contract do not Appear from the Written Evidence Introduced.

The court below was of opinion that "what was done and what was written relative to the transaction, including the deed that was sent to the bank, constituted a valid contract in writing for the sale of these lands by the defendant to plaintiff Ferguson." (Transcript, 36).

And, if this conclusion be not correct, it is manifest the decree should be reversed, since it is nowhere found by the court that the deed became operative as a conveyance of the land, while the evidence is insufficient to sustain the decree upon any other theory, as will be shown later.

It is apparent, from the opinion filed in the court below, that the court, in arriving at its conclusion

that there was a valid contract of sale, took into consideration every one of the seventeen letters shown in the record and the deed. In this, it fell into error, since a number of the letters were not entitled to consideration for such purpose, nor, as we shall show, can the deed be thus used in aid of the contract. Analysis of the correspondence will demonstrate this. Thus, the letters dated July 24 and September 25, 1905 (Transcript, 56-57, 130), may be laid aside, having resulted in nothing. In that of July 24, Ferguson proposed a trade with Mr. Hewitt. Hewitt declined to trade, but said he "might" sell the lands in 6-6. That ended the matter. (Transcript, 76). In the letter of September 25, Ferguson offered $8,000 for four claims in "6-6." No reply to this appears in evidence. The letter written December 22, 1905, by Ferguson to Hewitt (Transcript, 82), has no place in the present inquiry, for it was not answered, and there is no writing subscribed by appellant or its agent agreeing to anything said in it. So, too, of the letter of January 3, 1906, from Ferguson to the bank (Transcript, 48-49); not only was it not answered, but it nowhere appears that appellant or its agent ever heard of the letter until the day of the trial, and no reference to it will be found in any writing subscribed by appellant or its agent. The letters of January 8 (Transcript, 68-69), January 25 (Transcript, 84-86), and January 26 (Transcript, 92-93), written by Ferguson to Hewitt, are also imma-

terial on this branch of the case, since neither was answered, and no writing is in evidence, signed by appellant or its agent, assenting to anything said in either of them. Nor, do the letters from the bank (Transcript, 50-51, 83), the first returning the deed for correction, and the other inquiring whether "there is any possibility of the trade being closed," aid appellees in this respect, since no answer to either of them appears, nor does either letter refer to any term of the contract of sale.

With those letters eliminated, the following correspondence remains from which the contract must be ascertained:

On December 22, 1905, Mr. Hewitt wrote to the bank—

"Please deliver the enclosed deed of lands in 6-6 West to E. Z. Ferguson for $12,800.00 net to us in Tacoma funds. We have notified Mr. Ferguson and he will probably call for the deed at an early date." (Transcript, 47).

On the same day, he wrote to Mr. Ferguson—

"We have today sent deed for lands to Astoria N. Bk., which they will deliver to you on payment of $12,800.00. I will send you a check for commissions when money is received of 2½ per cent. Our directors would not allow more and in fact did not like to deed the land at all. We consider this land worth 30,000. However, if you can find us the land you promised, will send my son or another

good cruiser to look over lands and in some way make good my promise to you. Now hustle and *find the other land.* It must be comeatable and good logging chance finally." (Transcript, 63).

Twelve days later, January 3, Ferguson wrote appellant—

"On December 26th, I wrote you in regard to the title to your land which I am purchasing, stating there was lacking in the title, a power of attorney from Harriet M. Lockwood to Herbert S. Griggs, but up to this time have no reply. My attorney has examined the abstract in regard to this title, but in addition to the power of attorney which is lacking, he finds two other matters which need attention. In the deed which you sent here, the description reads T. 6 S. instead of T. 6 N., also it does not appear that the Hewitt Investment Company has complied with the Oregon laws governing foreign corporations. I think for your own protection, that you would wish to straighten up this last matter on account of your other Oregon lands. I do not know how seriously this affects the title, but think it would be better if it was straightened up. I have today deposited in the Astoria National Bank the sum of $12,800, the sum to be sent to you in Tacoma Exchange when the title to this land is made perfect in me. I do this so that you will understand that I am not endeavoring to gain time, but am ready and willing to take over the deal whenever it is in shape for delivery.

In regard to the commission of 2½ per cent., as mentioned in your letter, I think it was thoroughly

understood between myself and Mr. Henry Hewitt that I was to have 5 per cent., and I think, of course, that I should have it, but if the company absolutely refuses to allow more than 2½ per cent., I will, of course, take the lands anyway. You can inform Mr. Hewitt that I will probably send him today or tomorrow maps and data regarding the other timber proposition that I talked with him about. I think that one of them, at least, will appeal to him. Trusting you will favor me with an early reply, Yours truly," (Transcript, 61-62).

On the same day, Ferguson wrote Hewitt—

"This morning I wrote to the Hewitt Investment Co., which letter you will undoubtedly receive about the time that you receive this, and at noon today *I received your letter of the 2nd*, to which I hasten to reply. I think, in order to get this matter straightened up with the greatest possible speed, it would be best for you to prepare a new deed making it just the same as the former deed, excepting to state that the land is all in T. 6 N., R. 6 W., W. M., instead of T. 6 S. as it now reads. It is evident from the deed in the bank that you have a copy and can see how this mistake occurred. This deed you can send to the bank to be substituted for the one that is now in their hands.

"If, at the same time, you have an original power of attorney from Harriet M. Lockwood, it could be sent over and recorded in this county. If you haven't the original, you can have a certified copy made from the records there which will answer the same purpose, but before doing this, I would sug-

gest that you examine the power of attorney carefully and see if it conveys sufficient power to enable Mr. Griggs as her attorney to convey lands in Oregon, otherwise, it would be of no use and it would be necessary to obtain a deed direct from Mrs. Lockwood. Under the Oregon laws, the wife's interest is absolutely necessary to have. We are very particular in regard to our titles, because we expect to sell this land some day and do not wish to have any trouble when the time comes.

"In regard to the Hewitt Investment Company's having failed to comply with the Oregon laws governing foreign corporations, we will not let this delay the deal, but will take it for granted that you will straighten it up at your leisure, but would like to know, when you write me the exact amount of the Company's incorporated capital. Thinking it possible that you may not be fully informed as to the Oregon laws, I enclose you herewith some circular matter that I have received from the Secretary of State as I happen to have a surplus of them on hand. Trusting that you will find the power of attorney all O. K., yours truly,

"P. S. In regard to the commission of 2½ per cent. instead of 5 per cent. as you agreed, I hardly think that you should cut me off from this, as it was thoroughly understood between us, and I believe that after you have considered the matter fully, that you will persuade the company to allow it. However, in any event, we want the land whether the company will allow us 5 per cent. or not. I am enclosing you under separate cover, one

of the propositions that I talked about when I was in your office." (Transcript, 65-67).

Two days later, January 5, Hewitt replied to the latter letter—

"Your favor of Jan. 3 received. I have written Astoria Nat. Bank to return deed and as you suggest will make out new deeds. Mr. Griggs has the old Hattie Lockwood deeds signed by him as power of attorney and will send new deed for her to sign. It may take some little time.

"About the commission ,the Company some time ago passed resolutions to only allow 2½ commissions for sales of lands, of which I was not informed, and besides this when I brought the matter up the directors all but myself were against selling and would not have consented at all only to accommodate me. I should have brought the matter up. Of course you know what any officer promises is only good for his best endeavors to carry out his promise. You are mighty lucky to get the land at all.

* * *

"Now about those lands you send me descriptions. The Red & Black look good providing the mill gets rates to Eastern points same as Portland. Do the Oregon Short Lines assume this extra rates? If Hammond owns this road evidently he has already bottled up this poor mill company. You say timber can be bought for 30c, he charges them $2.00, how is this and what will he do to us if we buy the other timber and will he not also bottle us up? What is

the quality of timber? Is it old growth yellow fir and high land spruce and how large and what proportion spruce, is there any cedar, etc., and how about quality? How much hemlock and what will that cost, if anything, and don't you know of something better that we should have a fair chance to succeed if we operate in competition with Portland?

"Advise bank to return deeds, Hewitt." (Transcript, 64-65).

On the same day, appellant wrote the bank—

"The Hewitt Investment Co. or Henry Hewitt, Jr., sent you some time ago deeds to deliver to E. Z. Ferguson on payment of $12,800. I think the deeds it seems are faulty and Mr. Ferguson wants them changed. You will please return them and oblige," (Transcript, 50).

This completes the written evidence introduced at the trial admissible for the purpose of determining the terms of the alleged contract.

It is elementary that—

"Certainty in every essential particular, whether of terms or description, is indispensable to the specific performance of agreements."

2 Warvelle on Vendors, Sec. 740.

And that "a court of equity will not decree specific performance where it is not clear from the evi-

dence that the *exact terms thereof* were agreed upon and understood, * *." (Id., Sec. 871).

The terms of the contract alleged in the bill, briefly stated, are as follows:

That appellant would sell the lands to Ferguson for the use and benefit of the Minnesota corporation.

That the consideration for the sale was $12,800.

That appellant should make a deed conveying the land and deliver it to the bank in escrow until the money should be paid.

That the lands so to be conveyed were those particularly described in the bill; and

That appellant should furnish and convey to Ferguson a clear or valid record and marketable title.

We contend that *not one* of these terms is established by the written evidence adduced at the trial.

IT DOES NOT APPEAR THAT APPELLANT AGREED TO SELL THE LANDS TO OR FOR THE USE AND BENEFIT OF THE CORPORATION.

This term of the contract cannot be said to be immaterial. There might well be good reason to refuse to sell the land to the corporation, though appellant was willing to sell to Ferguson. That the term was deemed material by appellees is clear from the allegations of the bill that—

" * * plaintiffs desired and agreed to purchase said real estate for the use and benefit of the plaintiff corporation and as its property (Transcript, 2); and * * that while said deed was to be executed to plaintiff Ferguson, as grantee, defendant was informed by plaintiff Ferguson and well knew at the time said agreement was made and at all times thereafter, that plaintiff Ferguson was purchasing said real estate for the plaintiff corporation and with its money." (Transcript, 3).

Its materiality is still further emphasized by the prayer of the bill and by the decree, pursuant to the prayer, requiring appellant to convey the lands to the corporation. (Transcript, 8, 42).

No proof whatever of the allegations of the bill in this respect will be found in the writings set out above, or in any writing to be found in the record, nor are they established by the oral testimony of witnesses at the trial. Such proof was material and necessary, because it is well settled that

"Every one has a right to select and determine with whom he will contract, and can not have another person thrust upon him without his consent."

Ark. Smelting Co. vs. Belden Co., 127 U. S., 387.

Snow vs. Nelson, 113 Fed. Rep., 358.

In fact, it would appear by appellees' own evidence that the appellee corporation was not in existence at the time of the transaction, for appellee

Ferguson testifies that: "We were purchasing for the parties who *afterwards* formed the Minnesota and Oregon Land and Timber Company." (Transcript, page 58).

While it may be that the writings above referred to, standing alone, tend to show that the money consideration for the transfer of the title was $12,800, which was the cash payment required for delivery of the deed; yet we will show later on that that amount of money was not the sole, or even the principal, consideration for the conveyance of the title to the land.

No Agreement of Escrow Appears in the Writings.

The writings offered in evidence may be searched in vain for any agreement by appellant that it would execute a deed of conveyance of the land involved in this suit, and would deliver such deed to the bank to be held in escrow until the money was paid. There is no writing containing any such term of the contract of sale alleged in the bill. The only writings approaching the subject are the letter of Hewitt to Ferguson, dated December 22nd, and the letter of Hewitt to the bank of same date transmitting the deed and stating that Ferguson would probably call for it at an early date. (Transcript, 63, 47). The deed was sent by Hewitt to the bank as his agent merely for delivery on payment of the money, without any of the usual escrow conditions,

either expressed or implied; and the deed was received by the bank merely "for collection." (Transcript, 83).

The only other evidence on this point is the testimony of Ferguson as to his conversation with Hewitt at Tacoma, that Mr. Hewitt then said he "would send the deed over to the Astoria National Bank; he told me that he would have the deed executed, and would send it over, and I was to go home, which I did, and pay the money." (Transcript, 59). Ferguson also testified that the deed was sent to the bank on his verbal request to Hewitt, but there was no special agreement as to conditions of delivery, or payment of the money, which would constitute an escrow. (Transcript, 125).

This brief statement appears sufficient to clearly show that the writings in evidence do not support or establish the contract alleged in respect to delivery of the deed to the bank in escrow, but this subject will be more fully considered and discussed later on under the head that there was no deposit of the deed as an escrow and appellees never became entitled to delivery of the deed.

Nowhere in the Letters will be Found any Description of the Lands Involved.

It is elementary that a contract, to entitle it to specific performance in equity, must contain a certain description of the land. The court will look in

vain for any description sufficient to identify the land to be sold in any written evidence subscribed by appellant or its agent in the case at bar. The letters mention lands in "6-6," but there is no attempt to describe the lands mentioned in the bill. Nor, even though the deed could be referred to in aid of the letters in this respect, it is not in evidence. It may or may not have described the lands intended to be conveyed with sufficient certainty—there is no competent proof of the fact.

Grafton vs. Cummings, 99 U. S., 100.

The only writing shown in the record describing the lands involved in this suit is the letter of Ferguson to the bank, dated Jan. 3rd, of which letter neither appellant nor Mr. Hewitt had any knowledge until same was produced at the trial, and the letter was then admitted in evidence over appellant's objection. (Record, pages 47, 48).

The trial court in its opinion held that "what was done and what was written relative to the transaction, including the deed that was sent to the bank, constituted a valid contract in writing for the sale of these lands." (Record, page 36). In this, we submit that the court erred, for the reasons, that no writing signed by appellant or its agent described the lands, the deed did not correctly describe the lands, was not delivered, or deposited in bank as an escrow, and can not be considered as evidence of a

valid contract to convey or to supply any defects or insufficiency in the letters to prove a valid contract.

There is no Proof in the Writings that Appellant agreed to Furnish or Convey to Ferguson a Clear or Valid Record or Marketable Title.

It is alleged in the bill that appellant was to furnish a clear or valid record and marketable title, and the money was withheld by Ferguson for the reason that the title had not been *perfected* in him; but there is an absence of convincing proof that appellant ever *agreed* to make the title perfect of record.

True, there is an implied agreement in every sale that the vendor owns the property or is entitled to sell it; and it might, perhaps, be held in this case that there was an implied agreement on the part of appellant that it owned these lands; but that is a very different thing from an undertaking that its title was or would be made *perfect of record* or marketable.

The only instrument in writing, subscribed by appellant or its agent, to be considered in this connection, aside from certain letters necessary to an understanding of the terms of the contract not offered in evidence and to be referred to later, is the deed sent to the bank.

THE DEED CANNOT BE CONSIDERED FOR THE PURPOSE OF DETERMINING ANY OF THE TERMS OF THE CONTRACT.

Not only is the deed itself absent from the record, but, under the circumstances disclosed, even though the deed were here, it could not be resorted to as proof of the alleged contract of sale or any of its terms.

Kopp vs. Reiter, 34 N. E. Rep., 942 (Ills.);
Hartenbower vs. Uden, 90 N. E. Rep., 298 (Ills.);
Cooper vs. Thomason, 45 Pac. Rep., 296 (Ore.);
Wier vs. Batdorf, 38 N. W. Rep., 22 (Neb.);
Swain vs. Burnette, 28 Pac. Rep., 1093 (Cal.);
Day vs. Lacasse, 27 At. Rep., 124 (Me.);
Halsell vs. Renfrow, 78 Pac. Rep., 118 (Okl.);
Same case, 26 Sup. Ct. Rep., 610;
Nichols vs. Opperman, 34 Pac. Rep., 162 (Wash.).

It is apparent that the court below considered the deed sent to the bank, in connection with the correspondence and acts of the parties proven by parol testimony in arriving at its conclusion. (Transcript, 36). But it will be found, under the authorities above cited, this instrument cannot be consulted for such purpose.

In this respect, the case of *Halsell vs. Renfrow*, 26 Sup. Ct. Rep., 610, is much in point. An agent

entered into an agreement to sell land. The owner confirmed the proposed sale by telegraph. Later, it was found that a portion of the tract had already been sold, and that another portion was in possession of a tenant who declined to vacate. The agent and purchaser came to an agreement as to that part of the land previously sold, but not as to the leased land. The owner was willing to convey and take proceedings to oust the tenant, but the purchaser declined to take the conveyance unless he could be given possession within thirty days. In that situation, the owner executed a deed and sent it to a bank with instructions to deliver it to the purchaser on payment of the purchase price. The purchaser still declined to take the deed unless fuller possession could be given, whereupon the owner sold the premises to another man. Thereafter, the original purchaser brought suit to compel specific performance of the contract of sale. In denying relief, the Supreme Federal Court said:

"So far * * as the writings convey the notion of an absolute undertaking to convey a present clear possession, *they do not express the modified bargain* to which Renfrow was willing to assent. The delivery of the deed was authorized only upon payment of the price, and acceptance of it would have been an assent to Renfrow's terms. *But there was no such assent.* The plaintiffs say now that the differences were only trifles, not going to the essence of the contract, but they were enough at the

time to make them unwilling to accept the deed." (612, Opinion).

So, here, if the writings convey the notion of an absolute undertaking to convey title, *they do not express the modified bargain* proposed by Ferguson that the title should be *perfect of record.* The delivery of the deed was authorized only upon payment of the price, and an acceptance of it would have been an assent to appellant's terms. *But there was no such assent.* The bank was instructed to "deliver the enclosed deed * * for $12,800 net to us in Tacoma funds, * *" (Transcript, 47), and Ferguson was notified of the fact. (Transcript, 63). Instead of paying the money over and accepting the deed, he notified appellant:

"I have today deposited in the Astoria National Bank the sum of $12,800 * * to be sent to you * * *when the title to this land is made perfect in me.*" (Transcript, 62).

And, even up to the time of the commencement of this action, and the alleged deposit of the money in court for appellant, it is manifest there had never been an unconditional payment or tender of the money, for we find Ferguson testifying at the trial, as already shown, that he did not consult appellant about withdrawing the money from the bank because

"I considered the money was there subject to *my* order, and *I had a right to withdraw it* without ob-

taining any consent of Mr. Hewitt" (Transcript, 73-74).

And, in his letter to Mr. Hewitt, written on January 25, 1906, we find him saying:

"Now in regard to paying interest on the $12,800 *until you perfect the title* * *. I would like to know how long a time you would wish to have to straighten the title * *. *If it can be arranged satisfactory to all of us*, I would rather pay the money over to *you*. In case we would pay the $12,-800 to the Hewitt Investment Company and take its warranty deed to the land, *would you and the company be willing to give me an agreement and assurance that you would perfect the title*, say within a year, or longer, if need be?" (Transcript, 84-86).

It is thus made clear that, at that time, no completed agreement had been reached between these parties for the sale of the land, and there had been no acceptance of the offer of appellant as made. The letter from which we quote was never answered, and in none of the writings in evidence will be found any undertaking on the part of appellant to *perfect* the title of record. As said by the court in *Halsell vs. Renfrow*, last cited:

"There may have been a previous oral agreement, such as is suggested by the letter and deed, but before any memorandum was made, and while Renfrow (appellant) was still free, the plaintiffs were informed that Renfrow would undertake to do *only what he could*" (612, Opinion).

In the case at bar, while the negotiations were still in progress, the appellant exercised its right to recall the deed. Until the negotiations had ended and there had been a completed contract of sale, the transaction constituted no more than an offer to sell which appellant might withdraw at will. Under such circumstances, the authorities hold that, unless the deed expresses the *terms of the contract* of sale proposed to be proven, it is inadmissible in aid of other testimony to satisfy the statute of frauds.

In *Cagger vs. Lansing*, 43 N. Y., 550, a deed actually in escrow was held insufficient to satisfy the statute, the court saying:

"The counsel * * insists that the deed * * delivered in escrow is a contract for the sale of the land executed by the intestate. This position cannot be sustained. The deed purports to be a conveyance of all the intestate's interest in the premises for a consideration therein expressed of $1,000, *but is wholly silent as to the terms of the contract pursuant to which it was made.*"

In *Swain vs. Burnette*, 89 Cal., 564, the court says:

" * * an undelivered deed, executed in pursuance of an oral agreement of sale, cannot be regarded as a sufficient memorandum to satisfy the statute of frauds, *unless it is shown to have contained a memorandum of the oral agreement.*"

And, in *Kopp vs. Reiter*, 34 N. E. Rep., 942, the Supreme Court of Illinois declared:

"Many cases cited as authority for the position that a deed executed by an owner of land, but not delivered, is a sufficient memorandum of a contract of sale, under the statute, will * * be found, upon examination, to refer to *deeds containing the terms of the contract*" (944, Opinion).

The Oregon court, in *Cooper vs. Thomason*, 45 Pac. Rep., 296, citing *Kopp vs. Reiter* with approval, says:

" * * the deed deposited in escrow, unless it contained a memorandum of the agreement, was inoperative to take the case out of the statute of frauds" (299, Opinion).

In *Hartenbower vs. Uden*, 90 N. E. Rep., 298, the Illinois court, speaking again to the point, said:

"It is essential * * that the writings contain everything necessary to show the contract between the parties, so that there be no need of parol proof of any of the terms or conditions of the sale or the intention of the parties. The contract cannot rest partly in writing and partly in parol, but the written memorandum must disclose all the terms. * * The undelivered deed * * contains no conditions whatever, and makes no mention of the terms of the contract upon which it was made. It purports to be simply a conveyance of the land. It is no memorandum or note of the contract" (300, Opinion).

Wier vs. Batdorf, 38 N. W. Rep., 22 (Neb.), often cited and followed, declares:

"We have made a pretty thorough search, but have been unable to find any case which sustains the position that an undelivered deed may be treated as a memorandum in writing. * * It is sometimes said that * * letters may be used as a memorandum of the contract. * * In a proper case, there is no doubt of the admissibility of such evidence; but the rule, if invoked in this case, would not aid plaintiff. Here, the contract rested in parol, *neither party being bound until the delivery and acceptance of the deed.* The case, therefore, comes clearly within the statute of frauds."

And, in *Catterlin vs. Bush*, 65 Pac. Rep., 1064, the Oregon court says:

"The memorandum and the contract or agreement are not to be confounded as one and the same thing. The memorandum is understood to be a note or minute * * of the agreement, * * expressing briefly the essential terms, and was never intended to stand as and for the agreement itself. The necessary elements are that it must contain the essential terms of the contract, expressed with such a degree of certainty that it may be understood *without recourse to parol evidence* to show the intention of the parties. * * It must show * * and disclose the terms and conditions of the agreement."

Here, no deed has been offered in evidence, and it is impossible to determine whether this deed did

or did not contain any of the terms of the agreement pursuant to which it was made.

Nor does it Appear that the Agent of Appellant, who Negotiated the Sale, was Authorized Thereto in Writing.

The Oregon statute not only requires that the terms of the contract be proven by written evidence; but, that, if the writings are signed by an agent, his authority to act must also be shown to be written.

The application of this rule will operate to exclude several of the letters received below from consideration by the court and render the evidence most decidedly *unsatisfactory* for any purpose. The negotiations for this sale were carried on almost entirely between Mr. Ferguson and Henry Hewitt, Jr., the president of the company. So far as the letters were signed by Mr. Hewitt, he must be deemed to have acted as the agent of appellant, yet there is no proof that his authority so to do was in writing. The nearest approach to such evidence is found in the by-laws of the company, in which it is provided that the president—

" * * shall be the general manager of the corporation, with full power to *buy* real estate * * or anything which the company is authorized to hold, buy and sell, subject to the approval of the finance committee, of which he shall be chairman" (Transcript, 144).

But this is far from proof that Mr. Hewitt was authorized to negotiate a sale of this land. It is plain, the authority conferred by this by-law was to *buy*, not to *sell*, land; and unless the court can find in this record clear and satisfactory evidence that authority was given by appellant corporation to Mr. Hewitt as its agent to *sell* the land, and that such authority was in writing, the evidence is insufficient to establish a valid contract of sale under the statute.

Again, if full consideration be given to every writing offered and received at the trial, it is manifest that—

THE WRITTEN EVIDENCE, ESSENTIAL TO A FULL UNDERSTANDING OF THE TRANSACTION INVOLVED, IS INCOMPLETE, AND WRITINGS MATERIAL THERETO ARE OMITTED.

The burden rests upon appellees to prove, by clear, satisfactory and convincing evidence, every essential term and condition of the alleged contract.

Jones vs. Patrick, 145 Fed. Rep., 440.

If the contract alleged in the bill had been embodied in a single instrument, and, upon presentation of that instrument, it appeared that the document had been mutilated by removing a portion of it evidently containing matter necessary to a full understanding of the contract, we submit, the court would not hesitate to reject the instrument alto-

gether, unless the mutilation was accounted for and secondary evidence of the contents of the missing parts received; nor does the case at bar differ from the case supposed.

If we turn to the writings offered and received at the trial, not only do they fail to prove the terms of the agreement alleged in the bill, but it is clear that other written evidence essential to an understanding of the transaction has been omitted by appellees.

The rule is that—

"Where a writing offered refers to another writing, the latter should also be put in at the same time, provided the reference is such as to make it probable that the latter is requisite *to a full understanding of the effect of the former.*"

3 Wigmore on Evidence, Sec. 2104.

In the letter of January 3, written by Ferguson to Hewitt, we find him saying:

" * * at noon today, I received your letter of the *2nd*, to which I hasten to reply. I think, in order to get this matter straightened up with the greatest possible speed, it would be best for you to prepare a new deed * * ," etc. (Transcript, 65-66).

Here is a reference to a letter presumably in the possession of appellees, relating to the transaction involved, plainly requisite to a *full* understanding

of the matter in hand; yet the court will search the record in vain for the letter of the "2nd."

Again, in the letter written by Ferguson to Mr. Hewitt, dated January 25, 1906, the writer says:

"Your recent letter received; it has no date, but was probably written January 13th as the letter to the bank, to which they have called my attention, is dated the 13th. * * I noticed in the letter to the bank, that you say that I promised to get you other lands just as good for 30c per 1,000; you will please pardon me for contradicting you on this point * * ," etc. (Transcript, 84).

Here is a reference to *two* letters, evidently signed by the agent of appellant with whom the negotiations were carried on, clearly relating to the terms of the alleged contract and necessary to any *full* understanding of the transaction; yet neither of these letters was offered in evidence, although presumably in possession of the appellees.

In this situation, we submit, the written evidence is incomplete and wholly insufficient to establish the alleged contract or to satisfy the statute.

(III.)

THE EVIDENCE FAILS TO SHOW A MEETING OF THE MINDS OF THE PARTIES UPON THE TERMS AND CONDITIONS OF THE CONTRACT.

"It is an essential element of all contracts that the minds of the parties meet and that they assent

to the same thing in the same sense, and, as some of the cases put it, *at the same time.*"

Foshier vs. Fetzer, 134 N. W. Rep., 556, 564 (Iowa);
Watters vs. Lincoln, 135 N. W. Rep., 712;
Miles vs. Hemenway, 111 Pac. Rep., 696 (Ore.).

And specific performance—

" * * should never be granted unless the terms of the agreement * * are clearly proven, or where it is left in doubt whether the party against whom relief is asked in fact made such an agreement."

Hennessey vs. Woolworth, 128 U. S., 442;
Dalzel vs. Mfg. Co., 149 U. S., 315.

And "*especially*, in a case like this, *where, as appears, the property was rapidly increasing in value.*"

De Soller vs. Hanscome, 158 U. S., 222.

We will show later on that the property involved in the case at bar rapidly increased in value between December 22, 1905, and the commencement of the suit, and that the minds of the parties never met upon the *same thing in the same sense at any time.*

A few days before the deed was sent to the bank, Mr. Hewitt and Mr. Ferguson had a talk at Tacoma, which evidently resulted in the forwarding of

that instrument. Testifying concerning that conversation (over the objection of appellant that oral testimony was incompetent in the premises), Mr. Ferguson said:

"Mr. Hewitt didn't seem particularly anxious to sell, but, after talking it over * * and telling him that I thought he could take the money and do better elsewhere with it, anyhow, why—we agreed that he would take $12,800, $20 an acre, for the four claims, and would send the deed over to the Astoria National Bank. He told me that he would have the deed executed and would send it over, and I was to go home * * and pay the money. *That was about all the main points of the transaction*" (Transcript, 59).

Mr. Hewitt testified concerning the same talk—

"The agreement * * was made a very short time before we made the deed * *. All prior negotiations up to that time had closed. Mr. Ferguson came personally and convinced me that it would be a good thing for me to let him have these lands and he would buy me those other lands from 25 to 30 cents a thousand. * * I told him I didn't have the money but would sell these lands at the price he made, *providing we could get the other lands.* * * He told me he had the offers and could get the other lands at that price; that was the inducement for me to get my son to sign the deed. *The consideration was getting these other lands for less money,* adjoining our other lands. *If those other lands had not been agreed to be procured for our company, I would not have procured* * *

the execution of this deed. My son absolutely refused to sign the deed and I told him that Ferguson had promised to get me these other lands. * *. My son was secretary of the Hewitt Investment Company" (Transcript, 76-77).

The correspondence, too, shows plainly that it was agreed in that conversation that Mr. Ferguson was to do something more than pay over the purchase price of the land. Just what that something was may be in doubt, when the testimony is considered as a whole, but that the minds of the parties did not meet upon it, is plain. Thus, in the first letter from Mr. Hewitt to Ferguson following the talk, he says:

"We consider this land worth 30,000. However, *if you can find us the land you promised,* will send my son * * to look over lands * *. *Now hustle and find the other land* * *" (Transcript, 63).

No denial that he had promised to find the other lands appears in any of the subsequent letters signed by Mr. Ferguson. On the contrary, the letters show that he recognized an obligation on his part in this respect and made some attempt to carry out his promise. On January 3, he writes to appellant—

"You can inform Mr. Hewitt that I will probably send him today or tomorrow maps and data regarding the other timber proposition I talked about, * *" (Transcript, 62).

On the same day, he writes to Hewitt—

"I am enclosing under separate cover one of the propositions that I talked about when I was in your office" (Transcript, 67).

On the day the deed was sent, before he had received notice of it, Ferguson wrote to Mr. Hewitt—

"Up to this time, I have been too busy to send you the map *of the other land*, but will do so soon. * *" (Transcript, 82).

Replying to a letter from Hewitt concerning certain lands, descriptions of which had been forwarded by him, Ferguson says:

"As to the land in 5-9, in connection with the Seaside Mill Co., I have to say that the statement that you make is undoubtedly true," etc. (Transcript, 68-69).

And, after withdrawal of the deed and repudiation of the agreement by appellant, claiming that the promise made by Ferguson during that conversation had not been kept, on January 25, we find Ferguson writing to Hewitt—

"I noticed in the letter to the bank that you say that I promised to get you other lands just as good for 30c per 1,000; you will please pardon me for contradicting you on that point * *. What I said was that from 25c to 30c per 1,000 was about as high as any of the timber buyers were paying * * and that I was satisfied you could take the

money that you received for this land and buy other lands for a less price * *. I also mentioned particularly that there were some lands adjoining the Hewitt Investment Company's lands which I felt certain that you could purchase for less than you were receiving * * and, in the course of the conversation, *I said I would make you a map showing this land and send it to you*" (Transcript, 84-85).

While it is clear he had not even then fulfilled the promise he thus admits he made, for he immediately adds—

"Since coming home, I have been too busy to get this up as I wanted to, but will enclose the map herewith * *" (Transcript, 85).

If there be some conflict in the testimony of the witnesses concerning what was said and what promises were made during that conversation, the fact only emphasizes the wisdom of the rule excluding and forbidding resort to such testimony in aid of writings to prove the terms of such contracts. Looking to the writings alone, it is apparent that *some* agreement was made or attempted to be made between the parties here, the terms of which cannot be ascertained without the aid of other testimony. As to what it was, the recollection of the parties differ, but that it was material to the negotiations in hand cannot be doubted. We find one party referring to it in the correspondence, and the other referring to the same thing, but declaring that he

was misunderstood or misconstrued. It is plain from this, that the minds of the two men did not meet in agreement upon *the same thing in the same sense* at least as to this feature of the undertaking, hence there was no completed contract.

At least two distinct conditions to a completed contract were imposed by these parties, neither of which is definitely stated in the writings: one, imposed by Ferguson, required that the *record* title should be made *perfect and marketable;* the other, imposed by appellant, required that other lands, adjoining those owned by it in another county, be procured for it at a much less price than it was to receive for the lands sold. That no agreement was reached concerning either of these conditions seems certain. If appellant was to furnish a *perfect* record title, the fact does not appear from the writings; while, if Ferguson was to procure other lands in which to invest the money at a profit, he does not appear to have understood that he was to do so. The burden of proof on these matters was upon the appellees, and, if the contract was complete in either respect, it was incumbent upon them to produce written evidence of it. So far as the testimony of witnesses at the trial is concerned, the writings strongly corroborate that of Mr. Hewitt, and, when the real value of the land is considered (of which more hereafter), his version of the talk, and of what was agreed upon, appears much more reason-

able than that of Mr. Ferguson. At all events, wherever the truth may lie, it is clear there was no meeting of the minds upon the same thing in the same sense at any time, and, under the authorities, specific performance must be denied. See, in addition to cases already cited,

Lambert vs. Gerner, 76 Pac. Rep., 53.

And where the writings, representing the negotiations of parties for the sale of land, fail to show that one of them agreed to a condition required by the other, there was no meeting of the minds in a completed contract so as to render it enforceable, and an agreement thereto can not be shown by parol.

Colleton Realty Co. vs. Folk, 67 S. E. Rep., 156.

In *Pressed Steel Car Co. vs. Hansen*, 128 Fed., 444, it was said:

"Where it is doubtful whether an agreement has been concluded, and unless the proof is clear and satisfactory, both as to the existence of a contract and as to its terms, specific performance will not be enforced."

In the same case on appeal, 137 Fed. (C. C. A.) 403, it was held (syll):

"To warrant a decree for the specific performance of a contract, such contract must be clearly and unequivocally proved, and its terms, as to subject-

matter, consideration, and all other essentials, must be specific and unambiguous."

Logue vs. Langan, 151 Fed. (C. C. A.), 150.

The rule is well settled that the contract can not rest partly in writing and partly in parol, but it must be wholly established by the writing, unless there has been a part performance, or possession taken and improvements made, none of which facts were alleged or proven in this case.

Wilson vs. Hoy, 139 N. W. (Minn.), 817.

"In order that any agreement, whether covered by the statute or not, whether written or verbal, may be specifically enforced, it must be *complete* in all its parts; that is, all the terms which the parties have adopted as portions of their contract must be *finally and definitely settled;* and none must be left to be determined by future negotiations; and this is true without any regard to the importance or unimportance of these several terms."

Kane vs. Luckman, 131 Fed. 616, citing—

Pom. Spec. Perf., Sec. 145.

In *Halsell vs. Renfrow*, 78 Pac., 118, for specific performance, it was said:

"In order to be sufficient (to make a binding contract under the statute) the letters, telegrams and writings relied upon must, by reference to each other, disclose every material part of a valid con-

tract, and must be signed by the party sought to be charged. They must set out the parties, the subject matter, the price, the description, terms and conditions, and leave nothing to rest in parol. (Citing cases.) It is a general rule that parol evidence can not be permitted to supply any omission of any essential element of the contract." Affirmed in 202 U. S., 287.

The evidence shows a complete failure of any mutual agreement between the negotiating parties; the negotiations and correspondence were carried on by the parties upon a different basis of purpose, intent, and understanding of the agreement proposed to be made, and resulted in no mutual agreement which either party was entitled to have specifically enforced.

This court has stated that:

"A suit for specific performance can only be maintained where the terms of the agreement are so precise that they cannot be reasonably misunderstood. * * And where the contract is susceptible of different reasonable interpretations, *a court of equity ought not to take the chances of decreeing its specific execution* in a way which will possibly do violence to the intention of the parties * *."

Minnesota Tribune Co. vs. Asso. Press, 83 Fed., 357.

(IV.)

THE DEED WAS NOT DEPOSITED IN BANK AS AN ESCROW.

It was seriously contended in the court below that—

"The deposit of the deed in the bank was an escrow and, in contemplation of law, the deed was still there when this suit was instituted, for, it being in escrow, it could not be withdrawn without the consent of both parties, and the withdrawal was for a single purpose, namely, to correct an error, and the defendant had no right to retain it beyond the time necessary to correct the error."

Since it is probable this contention will be renewed here, although it does not appear to have been sustained below, we will address ourselves to it briefly.

The transaction shown by the correspondence is that of a vendor forwarding papers to a bank for *collection* of the purchase price of lands, with authority to deliver the deed on payment of the money by the vendee. The bank became merely the *agent of appellant* to receive the money and deliver the deed. There is no word of any escrow, or of any agreement of the bank to receive the deed as an escrow, or of any agreement by the parties that there should be an escrow, in any of these letters, nor do they establish the *fact* that the instrument in truth constituted an escrow.

The case of *Van Valkenburg vs. Allen*, 126 N. W. Rep., 1092 (Minn.), is directly in point, wherein the court says:

"The case did not involve an escrow in the technical sense. There was no delivery to a custodian *in pursuance of an agreement of the parties* to the transaction, either express or implied. *The bank was not a party to the agreement, and was in nowise agreed upon by the parties as the custodian. It was merely Allen's agent;* its possession was Allen's possession; the deed it received was under Allen's control and dominion."

In that case, as in the case at bar, a deed was sent by a vendor of realty to a bank for delivery to the vendee on payment of a named sum.

So, too, the Supreme Court of Oregon says:

"It was not a deposit upon a contract with him *that it should be deposited*, nor had he a right to demand that it remain in escrow for his benefit or for any period of time."

Davis vs. Brigham, 107 Pac. Rep., 963 (Opinion).

"In order that an instrument may operate as an escrow, not only must there have been sufficient parties, * * *but the parties must have actually contracted.* When the instrument purports to be a conveyance of land * *, the grantor must have sold and the grantee must have purchased, the land. A proposal to sell or a proposal to buy, though

stated in writing, will not be sufficient. The minds of the parties must have met, the terms must have been agreed upon, and both must have assented to the instrument as a conveyance of the land, which the grantor would then have delivered and the grantee received, *except for the agreement then made that it be delivered to a third person*, to be kept until some specified condition be performed, and thereupon be delivered to the grantee by such third person." Id.

"Therefore, the remittance of the deed * * was not an escrow, and was subject to his recall at any time before it was delivered." Id.

That the deed was received *for collection by the bank* is further shown by the postal card acknowledging its receipt, as follows:

"Your favor of the 22nd inst. received with enclosures as stated. (Entered *for collection.*) J. E. Higgins, Cashier" (Transcript, 83).

Nor did it become an escrow upon the payment of the money into the bank, since the money was not paid in as the money of appellant, but as that of Ferguson. This is apparent, not only from the letters alluded to, but from the testimony of Mr. Ferguson at the trial that—

"At the time I withdrew the money from the bank, I didn't ask or obtain any consent of Mr. Hewitt to such withdrawal. *I considered the money was there subject to my order*, and I had a right to

withdraw it without obtaining any consent of Mr. Hewitt" (Transcript, 73-74).

If the money was thus subject to the withdrawal by appellees, clearly the deed was also subject to recall by appellant.

The transaction thus disclosed by the letters and testimony did not create an escrow, or constitute a delivery of the deed, which would give the appellees title. At all times, the deed was in the hands of the bank as the agent of appellant, subject to its complete control. As said by Mr. Devlin:

"Where the grantor retains the right of control over the deed, it is not an escrow, notwithstanding it may have been deposited with a third person with instructions to deliver it to the grantee upon the compliance with certain specified conditions. Where a grantor places a deed in the hands of a third person, to be delivered upon payment of the consideration, in pursuance of a correspondence in writing as to the purchase and sale of the land, agreeing upon the terms but not describing the land, *the grantor may at any time before payment destroy the deed.*"

1 Devlin on Deeds (3rd Edition), Sec. 273 a.

The case of *Miller vs. Sears*, 27 Pac. Rep., 589 (Cal.), is also in point, where it is said:

"It can not be held that plaintiff's papers were delivered to the defendants as an escrow. There was no contract of sale concluded between the plain-

tiff and the other parties to the negotiations, *as the question of title remained to be settled to the satisfaction of the contracting parties.* This fact alone is fatal to the contention of respondents that they held the documents in controversy as an escrow."

In the case at bar, the letters prove beyond controversy that, at the time the deed was withdrawn by appellant, and up to the time when appellant refused to complete the sale, the question of title remained to be settled to the satisfaction of Ferguson. Thus, in the letter of January 3, written to appellant, he says:

"I have today deposited in the * * bank the sum of $12,800, the sum to be sent to you * * *when the title to this land is made perfect in me*" (Transcript, 61-62).

And in all the subsequent correspondence between the parties, even as late as January 25, it is made clear that the title still remained to be settled to the satisfaction of Ferguson as a condition precedent to a completion of the sale (See Transcript, 84-85).

In a later California case, it is said that, to constitute an escrow—

"The grantor must clearly and unequivocally evidence an intent and purpose to part with the possession and control of the deed for all time."

Hayden vs. Collins, 81 Pac. Rep., 1120.

No such evidence appears from the letters adduced in evidence here, or even from the testimony as a whole.

And see—

Wier vs. Batdorf, 24 Neb., 83 (38 N. W. Rep., 22);

Day vs. Lacasse, 27 At. Rep., 124 (Me.);

King vs. Upper, 106 Pac. Rep., 612 (Wash.);

Freeland vs. Charnley, 80 Indiana, 132.

We have already demonstrated that there was no escrow at all in the case, but, if we were to concede that it was competent to prove an escrow agreement by parol, and that the evidence adduced at the trial compelled a finding that there was an escrow, still the decree rendered in this cause cannot be sustained.

APPELLEES NEVER BECAME ENTITLED TO DELIVERY OF DEED.

It is elementary that, as pre-requisite to any right to compel specific performance of a contract, the plaintiff must show that he has himself performed his part of it. Hence, it was incumbent upon appellees on this branch of the case to prove that they had, at least, paid or tendered the purchase price of these lands and so become entitled to a conveyance of the title.

It is entirely clear from the testimony of Ferguson at the trial that there had never been an uncon-

ditional payment or tender of the alleged purchase price of these lands to appellant prior to the commencement of the suit. From first to last, appellees were insisting that the record title be made *perfect* in Ferguson as condition precedent to payment of the purchase price, and, even down to the commencement of the suit, and the withdrawal of the money from the bank by Ferguson to deposit in court, there was no time when appellant could have obtained the money, since the bank was instructed to deliver it over *only* when the title should have been *perfected* in Ferguson, and, as testified to by him—

"I considered the money was there subject to my order *and I had a right to withdraw it without obtaining any consent of Mr. Hewitt*" (Transcript, 73-74).

Clearly, since the right of withdrawal must be mutual in the premises, if appellees could withdraw the money, appellant could withdraw the deed. The money had not been paid to the bank to be delivered to appellant unconditionally, but was held by the bank as the agent of Ferguson, not to be paid over until the record title should have been perfected as required by appellees.

In this situation, there can be no doubt, appellees had not become entitled to possession of the deed at the time the suit was begun, and the action should

have been dismissed whether there was an escrow or not.

In a brief filed in the court below, appellees insisted that the suit was not one for specific performance at all; that—

"The deed was deposited in escrow and the money was paid to the party holding the deed, and we contend that * * the equitable title vested in the plaintiff Ferguson, or his principal, the Minnesota and Oregon Land and Timber Company. * * As a matter of fact, Ferguson was purchasing for the corporation plaintiff, and it could not make any possible difference to the defendant which one was principal so long as it was paid its money."

Since this position is likely to be assumed by appellees in this court, we will briefly consider it here.

If the premise asserted were sustained by the evidence, the argument to be based upon it might require an answer; but the premise fails. The deed was not delivered in escrow, the money was not paid over to appellant or to the bank for it without condition, the condition on which the money was deposited in bank was never complied with, and it does make a difference whether Ferguson or the appellee corporation was principal in the contract to purchase the land.

We have demonstrated by the highest authority that the corporation appellee cannot be thrust upon

appellant as purchaser of the land without its consent in writing signed by appellant or by its agent authorized in writing to do so, and we need not repeat what we have said on that subject.

It is equally clear from the evidence already set forth in this brief that the money deposited in bank remained subject to the order of appellees until the commencement of this suit, and was withdrawn from the bank by Ferguson without any notice to or consent of appellant; and that there was never a time, until long after the deed was withdrawn from the bank, if the time ever came, when appellant could have obtained the money. And—

There was Never any Delivery of the Deed in Escrow or Otherwise Such as Would Operate to Pass the Title to Appellees.

Such agreement as may have been made with reference to the deposit of the deed with the bank was made at the time Mr. Ferguson and Mr. Hewitt met at Tacoma. It was, therefore, a part of the contract of sale upon which appellees rely, and must be evidenced by some writing; but, if we were to concede that it is competent to prove the alleged escrow by parol, the result would be the same. Mr. Ferguson testified on this point—

"I think I requested Mr. Hewitt to send the deed to the Astoria National Bank. This request was made * * at the time we made the bargain for the lands * *. I don't know that there was any

special agreement as to the conditions under which the money was to be paid into the bank. Mr. Hewitt was to send the deed over, we were to have the abstract of title made, *and when the title was perfect, we would pay the money and take the deed*" (Transcript, 125-126).

Later, a deed that proved unsatisfactory to appellees was forwarded to the bank with instructions to deliver it to Ferguson for $12,800 (Transcript, 47); and Ferguson was notified that the bank would deliver that instrument to him on payment of that sum (Transcript, 63). The bank received the instrument and entered it *for collection* (Transcript, 83). A few days later, Ferguson deposited $12,800 in the bank with instructions that—

" * * when the title to the said land shall have been made *perfect in me* * *"
it should be paid over—

" * * and that pending the making of said title perfect in me, *you shall hold this money* and deed in your possession" (Transcript, 48-49).

At that time, three defects in the title were pointed out by appellees to be cured as condition precedent to a delivery of the deed:

(a) A mistake in the description of the land in the deed;

(b) The lack of an essential power of attorney of record; and

(c) A failure of appellant to comply with certain laws of Oregon (Transcript, 48-49).

In this situation, the instrument deposited with the bank was withdrawn and never returned, and the defects complained of were never cured (Transcript, 50-51).

In order that there shall be a delivery of a deed in escrow, effective as a conveyance, not only must there have been a completed sale, in which the minds of the parties have met, and the terms have been fully assented to, but—

" * * *both parties must have agreed upon the instrument as a conveyance of the land* * *."

1 Devlin on Deeds, Sec. 313 (3rd Edition).

And "as long as the proposals for sale or purchase are pending, it makes no difference whether the nominal grantor retains possession of the instrument, or it is placed in the hands of a third person. In either case it is ineffectual as a deed or an escrow."

Id.

While "if a deed is deposited with a third person, by one of the parties to a contract * * *to be delivered to the other as soon as the question of title to the land shall have been determined* satisfactorily to the contracting parties, *the delivery cannot be considered as a valid delivery in escrow.* The custodian of the deed in such case is a mere depositary subject to the orders of the grantor."

Id., Sec. 313 a;
Miller vs. Sears, 91 Cal., 282 (De Haven,J.);
Davis vs. Brigham, 107 Pac. Rep., 963 (Ore.).

It is apparent, in the case at bar, the instrument sent to the bank was not acceptable to appellees and was never agreed upon "as a conveyance;" the question of the sufficiency of the title was still unsettled at the time the deed was withdrawn from the bank; and, since the depositary remained "subject to the orders of the grantor," appellant was entitled to withdraw the instrument without the consent of the appellees.

The deed having been rightfully withdrawn and no other instrument having been deposited with the bank, it is idle to talk of any delivery in escrow by which an equitable or any title was vested in appellees.

(V.)

THE SALE AND DEED WERE NOT AUTHORIZED BY APPELLANT CORPORATION.

The evidence shows that the sale and deed were made without authority therefor given by the corporation. The organization of the corporation provided for a board of five trustees or directors, and a finance committee composed of the president and two other trustees, which finance committee should "advise with and approve the purchases and sales made by the president"; and the president was au-

thorized "to *buy* real estate, * * subject to the approval of the finance committee" (Transcript, 144-145). Henry Hewitt, Jr., was president of appellant corporation, and a member of the board of trustees and of the finance committee, and his authority was thus limited by the by-laws. He testified that no authority was at any time given to him as president, by resolution or other action of the trustees or stockholders or finance committee, to make the sale or deed in question (Transcript, 78); this testimony is corroborated by J. J. Hewitt, secretary of appellant (Transcript, 142-143), and is uncontradicted.

Henry Hewitt, Jr., further testified that he told Ferguson, at the time the oral agreement was made, that he could not act for the corporation, and Ferguson knew it, but all he could do was to endeavor to get Ferguson the land if Ferguson would carry out his agreement (Transcript, 77-78). Hewitt was acting in the transaction as a personal matter, but had no authority to contract or sell the land without authority from the corporation, and he so informed Ferguson (Transcript, 81). The other members of the board of trustees and finance committee, when consulted, objected to the sale, and J. J. Hewitt signed the deed, as secretary, only on the assurance that Ferguson would procure the other lands for purchase by the company, and then the sale would be reported to the trustees and their

sanction obtained (Transcript, 108-117-120); but the transaction was never authorized or ratified by the corporation because Ferguson did not procure the other lands.

The evidence shows that the matter was handled as a personal transaction by Mr. Hewitt; all of the letters written to Ferguson and the bank were in his individual name, except the letter of Jan. 5th to the bank requesting return of the deed. There is, therefore, no evidence of any writing in the name of the corporation, or signed by any of its officers or agents as such (except the undelivered deed, which is not competent evidence of the contract of sale,) to take the case out of the statute of frauds, which provides that an agreement concerning real property made by an agent of the party sought to be charged is void, unless the authority of the agent be in writing.

The power of the president of a corporation is measured by the authority conferred by its charter and by-laws; he may be given power to make contracts and conveyances for the corporation, but his authority, further than specially conferred, does not extend to contracts or other acts not incident to the ordinary business of the corporation. The evidence shows that selling land was not the ordinary business of the corporation; practically no other lands had been sold, and no custom or ordinary course of

transaction of the business of selling lands had been established.

The evidence was that the appellant bought the Oregon lands, but did not sell any; since the purchase of the lands, this was the only business transaction it had in the state, and it had "never deeded any land, and didn't have any custom" (Transcript, 86-122).

It has been repeatedly held that the president of a corporation, in the absence of express or implied authority conferred on him, has no power, merely by virtue of his office as president, to contract to sell, convey, or exchange the real property of the corporation.

> 3 Clark & Marshall, Corp., p. 2128-2136;
> *Harding vs. Ore.-Idaho Co.*, 110 Pac. (Ore.), 412.

"The mere fact that one is a director, president, secretary or other officer of a corporation, does not make all his acts or declarations, even though relating to the affairs of the corporation, binding upon the latter. Such persons are mere agents, and their declarations are binding upon the corporation only when made in the course of the performance of their authorized duties as agents." 3 Clark & Marshall, Corp., p. 2226.

And especially will this limitation upon the power of the president be recognized and enforced, when the party dealing with him is expressly informed at

the time of his lack of general authority. Ferguson was informed when the agreement was made that he had not authority to act alone for the corporation, and in the letter of Jan. 5th (Transcript, 64) Hewitt wrote Ferguson that "the directors all but myself were against selling and would not have consented at all only to accommodate me. * * Of course you know what any officer promises is only good for his best endeavors to carry out his promise," which corroborates Hewitt's testimony that the agreement was then known to be only his personal "promise" to sell the land, which was to be subsequently authorized and ratified by the corporation in case Ferguson procured the other lands for purchase, as promised by him.

The president has no inherent power to contract for the corporation, and when authority to buy or sell property is expressly conferred, the power must be exercised in the manner conferred. The president has no implied power to sell and convey, or bind the corporation by his contract to sell and convey, the real property of the corporation. Under the theory of implied power, the president is authorized to sell the property or goods bought or manufactured by it for the *purpose of being sold in the line of its ordinary business;* but, outside of the transaction of the ordinary business of the corporation, the president has no implied or ex-officio power to sell or convey the property of the corporation, in the absence of proof of authority or custom.

2 Thompson on Corp., 2nd Ed., 1455, 1470;
Ansley Land Co. vs. H. Weston Lumber Co.,
152 Fed., 841.

So far as the contract of sale alleged was negotiated or made by Henry Hewitt, Jr., as the agent of appellant, any such agreement concerning real property was void under the Oregon statute of frauds, unless his authority as such agent was in writing. No competent evidence of such written authority given to Mr. Hewitt appears in the record.

(VI.)

TO DECREE SPECIFIC PERFORMANCE IS GROSSLY INEQUITABLE.

The courts do not grant specific performance of contracts as a matter of right, but only in the interests of justice, and upon clear and convincing evidence that the contract was made.

White vs. Wansey, 116 Fed. Rep., 345.

"It should never be granted unless the terms of the agreement sought to be enforced are clearly proven, or where it is left in doubt whether the party against whom relief is asked in fact made such an agreement."

Hennessey vs. Woolworth, 128 U. S., 442;
Dalzell vs. Mfg. Co., 149 U. S., 315.

Or where the property was rapidly increasing in value.

DeSoller vs. Hanscome, 158 U. S., 222.

In the case at bar, about a year elapsed after the transaction before suit was brought to compel performance of the contract, while, in the meantime, the value of the land had rapidly increased. This is made clear by the testimony of appellee Ferguson that the value of timber through that country "raised after that quite rapidly, and was raising all the time in 1906 and 1907. Timber went up very rapid during 1906. * * Timber went up very rapidly after this deal was made. * * The price of this land had advanced considerably before this suit was begun. The timber today on those four claims involved in this suit would be worth anyhow $40,000, possibly more" (Transcript, 124-125).

It follows, if the decree appealed from is allowed to stand, appellant will be compelled to donate to appellees outright $27,000, being the difference between $40,000, the admitted value of the timber alone, and $12,800 claimed by appellees to be the agreed price for both the *land* and timber. Only the clearest possible proof that appellant agreed to sell the land for that sum, under the terms and conditions alleged in the bill, could justify the decree entered—proof wholly absent from this record.

(VII.)

THE DECREE IS CONTRARY TO THE LAW AND EVIDENCE.

Whether this suit be considered one to establish an equitable title or to compel specific performance of a contract to sell, appellant contends, upon the grounds and authorities herein presented, that the decree of the trial court is not warranted or sustained by the law and evidence, but is contrary thereto, and is inequitable to appellant.

Without reviewing the argument made, or the facts proven and the law applicable thereto, appellant respectfully submits: That the trial court erroneously admitted incompetent evidence in support of the contract of sale alleged; that the competent evidence was insufficient to establish a valid contract of sale; that the alleged contract of sale is not evidenced by any writing; that the deed sent to the bank is not competent as evidence to prove the terms of the alleged contract; that the terms of the contract are not proven with sufficient certainty or clearness to warrant specific performance; that the minds of the parties never met upon any mutual contract; that the agent of appellant who negotiated the sale was not authorized by appellant or in writing; that there was no escrow agreement made, nor any deposit of the deed in escrow; that appellees never made an unconditional tender or

payment, and never became entitled to delivery of the deed; and to compel specific performance or to award the lands to appellees, would be grossly inequitable.

For the foregoing reasons, appellant respectfully submits that the decree should be reversed and the suit dismissed.

E. R. York,
T. W. Hammond,
Attorneys for Appellant,
Tacoma, Washington.

IN THE

United States Circuit Court of America

NINTH DISTRICT

HEWITT INVESTMENT COMPANY, a Corporation,
Appellant,

vs.

MINNESOTA & OREGON LAND & TIMBER COMPANY, and E. Z. FERGUSON,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

BRIEF OF APPELLEES

FULTON & BOWERMAN
Attorneys for Appellees

STATEMENT OF THE CASE.

This suit is prosecuted by appellees, whom we shall hereafter, for convenience, designate as plaintiffs, against the appellant corporation, which we shall hereafter designate, for convenience, as defendant. The de-

fendant, a corporation, under the laws of the State of Washington, owned four quarter sections of land in Township Six (6), North of Range Six (6), West of the Willamette Meridian, in Clatsop County, State of Oregon, which the plaintiff, Minnesota & Oregon Land & Timber Company, desired to purchase. Plaintiff, E. Z. Ferguson, was a stockholder in the plaintiff corporation, and conducted the negotiations in his own name, but disclosed to the defendant the fact that he was proposing to purchase the lands for the plaintiff corporation. The negotiations were carried on between said Ferguson and Henry Hewitt, Junior, president of the defendant, and consisted of oral conversations and written correspondence. It was finally agreed that the defendant would sell the lands to Ferguson for the sum of $12,800.00. The head office of the defendant corporation was at Tacoma, Washington, and it was agreed that the defendant should execute a deed conveying to Ferguson the lands, and should send such deed to the Astoria National Bank of Astoria, Oregon; that Ferguson should have an abstract made of the lands, and if it appeared that the title of the defendant was perfect thereto, he should pay the sum of $12,800.00 into the bank and take delivery of the deed. The deed was executed pursuant to that agreement, and by the president of the corporation forwarded to the bank, with instructions to deliver the same to Ferguson upon his payment to the bank, for the defendant corporation, the agreed purchase price. No time was stated within which the purchase price should be paid. The deed was sent to the bank on the 22nd day of December, 1905. A letter transmitting it read as follows:

"Astoria Natl. Bank,

Astoria, Ore.

Please deliver the enclosed deed of lands in 6/6 West to E. Z. Ferguson for $12,800, net to us, in Tacoma funds. We have notified Mr. Ferguson and he will probably call for the deed at an early date.

Yours truly,

H. HEWITT, Jr."

12-22-1905.

On the same date, Henry Hewitt, Jr., by letter notified Ferguson that, "We have today sent deed for lands to Astoria N. Bk., which they will deliver to you on payment of $12,800."

On the 3d day of January, 1905, Ferguson paid to the Bank $12,800. On examination of the deed, however, it appeared that the land was described as being in Township 6 *South,* instead of Township 6 *North.* Ferguson notified defendant of the error by letter, bearing date, January 3, 1906, and on January 5, 1906, the defendant, through its president, wrote Ferguson a letter saying:

"I have written Astoria Nat. Bk. to return deeds, and as you suggest will make out new ones. * * * Advise bank to return deed."

As stated in his letter to Ferguson, the president of the defendant, on January 5th, wrote to the bank, saying:

"The Hewitt Investment Co. or H. Hewitt, Jr., sent you some time ago deeds to deliver to E. Z. Ferguson on payment of $12,800, I think. The

deeds are faulty, it seems, and Mr. Ferguson wants them changed. You will please return them and oblige,

Yours truly,

Hewitt Investment Co.,

By Henry Hewitt, Jr., Pt."

Ferguson, as requested, asked the bank to return the deed, and thereupon the bank returned the deed as requested. The defendant did not, however, substitute a new or corrected deed, but afterwards declined to carry out the contract. The money was left on deposit with the bank as a tender until this suit was instituted. The case was tried before District Judge Wolverton, and a decree was entered in favor of the plaintiff.

ARGUMENT.

In their bill of complaint the plaintiffs contend that upon a deposit of the deed in the bank and the payment of the money into the bank for the defendants, the title to the property passed to Ferguson, but aver that if the court shall hold otherwise then that the correspondence, in connection with the deed, constitutes a sufficient contract to entitle the plaintiffs to a specific performance. The plainiffs therefore pray that they be decreed to be the owners of said real estate, the legal title thereto being in plaintiff, Ferguson, but if the court shall hold the title not to have passed to the plaintiff, Ferguson, then that the defendant be required to perform the contract and convey the premises in conformity thereto. In discussing this case, we shall contend:

1. That the deposit of the deed in the bank in the circumstances, constitutes an escrow, and the title passed to the grantee therein named, subject to his compliance with the conditions of the escrow.

2. That the correspondence between the parties sufficiently states the terms of the contract, the price to be paid, and refers to the lands so that they may be identified, and therefore constitutes a contract that satisfies the statute of frauds and one which a court of equity will enforce.

3. The conditions of an escrow need not be evidenced by writing, but may be established by parol testimony.

I.

CORRESPONDENCE.

We first invite the attention of the Court to the correspondence between the parties, which was as follows:

On the 24th day of July, 1905, Ferguson wrote to the defendant the following letter:

Astoria, Oregon, July 24, 1905.

"The Hewitt Investment Co.,

Tacoma, Wash.

Dear Sirs:—

You will remember that I have corresponded with you and also had a personal interview with your Mr. Hewitt some time since, in regard to the four claims that you own in 6/6, but at that time the price that you were asking for this land, was more than our parties would pay. I notice from the plats in my office that you are the owner of quite

a little bunch of land in 5/3 and 5/4, Columbia Co., and I would like to know if you would consider a proposition to trade your 4 claims in 6/6 for four claims adjoining the land that you own in Columbia Co., providing, of course, that the land was as well timbered with as good a quality of timber. Our information on this subject shows the timber to be about the same in both localities.

Hoping you will favor me with an early reply on this subject,

Yours truly,

E. Z. Ferguson."

To this the defendant, through Henry Hewitt, its President, replied by endorsing at the foot of the foregoing letter the following, and returning the same to Ferguson:

"Yours received on my return. I hardly care to trade lands. I might sell the whole bunch at $20.00 per acre. It is heavily timbered, will average from 6 to 9 M per claim. One claim somewhat burnt.

Yours, Henry Hewitt, Jr."

Negotiations were then continued orally, and the testimony of Mr. Ferguson, which in the following respects is undisputed, shows that the company agreed to sell the four claims for $20.00 per acre, or $12,800.00, and that it was agreed that the defendant should execute and forward the deed from Tacoma, Washington, to the Astoria National Bank, of Astoria, Oregon, and that Ferguson should have an opportunity to inspect the same and see that the title was perfect, when he should

pay the money to the bank for the defendant. Pursuant to that agreement, on the 22nd day of December, 1905, Henry Hewitt, Jr., president of the defendant, forwarded to the Astoria National Bank a deed conveying to Ferguson the lands in question. The letter enclosed with the deed to the bank was as follows:

"Astoria Nat. Bank,

Astoria, Ore.

Please deliver the enclosed deed of lands in 6/6 West to E. Z. Ferguson for $12,800.00 net to us in Tacoma funds. We have notified Mr. Ferguson and he will probably call for the deed at an early date. Y'rs truly, Henry Hewitt, Jr.
12-22-1905."

On the same day, Henry Hewitt wrote to Ferguson the following letter:

Tacoma, Dec. 22, 1905.

"E. Z. Ferguson,

Dr. Sir—

We have today sent deed for lands to Astoria N. Bk. which they will deliver to you on payment of $12,800.00.

I will send you a check for commission when money is received of 2½ per cent.

Our directors will not allow more, and in fact did not like to deed the land at all. We consider this land worth 30,000. However, if you can find us the land you promised, will send my son or another good cruiser to look over the lands & in some way make good my promise to you. Now hustle & find the other land. It must be comatable & good logging chance finally.

Yrs,

Henry Hewitt."

On December 22, and before Ferguson had received notification of the forwarding of the deed to the bank, he wrote to Henry Hewitt, Jr., the following letter:

Astoria, Oregon, Dec. 22d, 1905.

"Henry Hewitt, Jr.
Tacoma, Wash.

Dear Sir:—

I have just completed the abstracts for your land, but have not yet given them to the attorney. I have, however, looked them over myself and find one matter that needs attention. There are four deeds to the Hewitt Investment Company, and each is signed Lester B. Lockwood, Hattie M. Lockwood by Herbert S. Griggs, her attorney in fact, and we do not find any power of attorney of record from Hattie M. Lockwood. Please inform me if you have the P. of A. *and if so send it with your deed to the Bank;* if not, can you get a deed from her? If the attorney finds anything else will let you know, but I do not think there is anything else. Of course you are aware that in Oregon the wife has a dower and her signature is more important than in Washington.

"Up to this time I have been too busy to send you the map of the other land, but will do so soon. There is quite a little work to make it up.

When can I expect the deed?

Yours truly,

E. Z. Ferguson,
179 11th Street."

On the 3rd day of January, 1906, Ferguson wrote to defendant the following letter:

Astoria, Oregon, Jan. 3, 1906.

"Hewitt Investment Co.,

Tacoma, Washington.

Gentlemen:—

On Dec. 26th I wrote you in regard to the title of your land which I am purchasing, stating that there was lacking in the title a power of attorney from Harret M. Lockwood to Herbert S. Griggs, but up to this time, have no reply. My attorney has examined the abstract in regard to this title, but in addition to the power of attorney which is lacking, he finds two other matters which need attention.

In the deed, which you sent here, the description reads T. 6 S., instead of T. 6 N., also it does not appear that the Hewitt Investment Company has complied with the Oregon laws governing foreign corporations. I think *for your own protection,* that you would wish to straighten up this last matter on account of your other land in Oregon.

I do not know how seriously this affects the title, but think it would be better if it was straightened up. I have today deposited in the Astoria National Bank the sum of $12,800.00, the sum to be sent to you in Tacoma exchange when the title to this land is made perfect to me. I do this so that you will understand that I am not endeavoring to gain time, *but am ready and willing to take over the deal whenever it is in shape for delivery.*

In regard to the commission of 2½ per cent, as mentioned in your letter, I think it was thoroughly understood between myself and Mr. Henry Hewitt that I was to have the 5 per cent, and I think of course that I should have it, but if the company absolutely refuses to allow me more than 2½, *I will, of course, take the lands anyway.* You can inform Mr. Hewitt that I will probably send him today or tomorrow maps and data regarding the other timber proposition that I talked with him about. I think that one of them at least will appeal to him. Trusting you will favor me with an early reply. Yours truly.

E. Z. Ferguson."

On the same date, namely January 3, 1906, Ferguson wrote to Henry Hewitt, Jr., the following letter:

Jan. 3, 1906.

"Henry Hewitt, Esq.
Tacoma, Washington.

Dear Sir:—

This morning I wrote to the Hewitt Investment Co., which letter you will undoubtedly receive about the same time as you receive this, and at noon today, I received your letter of the 2nd, to which I hasten to reply. I think, in order to get this matter straightened up with the greatest possible speed, it would be best for you to prepare a new deed making it just the same as the former deed, excepting to state that the land is all in T. 6, N. R. 6 W. W. M. instead of T. 6 S. as it now reads.

It is evident from the deed in the bank that you

have a copy and can see how this mistake occurred. This deed you can send to the bank to be substituted for the one that is now in their hands.

If, at the same time, you have an original power of attorney to Mr. Griggs from Harriet M. Lockwood, it could be sent over and recorded in this county, if you haven't the original, you can have a certified copy made from the records there which will answer the same purpose, but before doing this, I would suggest that you examine the power of attorney carefully and see if it conveys sufficient power to enable Mr. Griggs as her attorney to convey land in Oregon, otherwise, it would be of no use and it would be necessary to obtain a deed direct from Mrs. Lockwood. Under the Oregon laws, the wife's interest is absolutely necessary to have. We are very particular in regard to our titles, because we expect to sell this land some day and do not wish to have any trouble when the time comes.

In regard to the Hewitt Investment Company's having failed to comply with the Oregon laws governing foreign corporations, *we will not let this delay the deal,* but will take it for granted that you will straighten it up at your leisure, but would like to know, when you write me, the exact amount of the company's incorporated capital.

Thinking it possible that you may not be fully informed as to the Oregon laws, I inclose you herewith some circular matter that I have received from the Secretary of State as I happen to have a surplus of them on hand.

Trusting that you will find the power of attorney all O. K.

Yours truly,

(Signed) E. Z. Ferguson.

P. S. In regard to the commission of 2½ per cent instead of 5 per cent as you agreed, I hardly think that you should cut me off from this, as it was thoroughly understood between us, and I believe that after you have considered the matter fully, that you will persuade the company to allow it. However, in any event, we want the land whether the company will allow us 5 per cent or not. I am enclosing you under separate cover, one of the propositions that I talked about when I was in your office.

. EZF.

On January 5th, Henry Hewitt wrote in response to the last letter of Ferguson, as follows:

Tacoma, Jan. 5th, 1906.

"E. Z. Ferguson,

Dr. Sir.

Your favor Jan. 3 received. I have written Astoria Nat. Bank to return deeds and as you suggest will make out new deeds. Mr. Griggs has the old Hattie Lockwood deeds signed by him as Power of Atty. and will send new deed for her to sign. It may take some little time.

Abt the commission the Co. sometime ago passed resolutions to only allow 2½ commission for sails of lands of which I was not informed & besides this when I brought the matter up the directors

all but myself were against selling & would not have consented at all only to accommodate me.

I should have brought the matter up. Of course you know what—any officers promise is only good for his best endeavors to cary our his promises—You are mightly lucky to get the land at all. Now abt the Oregon Populistic Law we think its absolutely unconstitutional and this land was deeded to Hewitt Investment Co. before this law came into effect & we have done no business since in fact I did not know of the law or its provisions I intend to convey other lands to H. Hewitt, Jr and do no more business in Hewitt Investment Co.—will that do or do you advise me to comply now with the law —the Co is incorporated for $50,000—37,000 paid in and its lands mostly in Washington.

How much and to whom should this be paid to I suppose its a state law. Now about those lands you send me descriptions? The Red & Black look good providing the mill gets rates to Eastern Points same as Portland—Do the Oregon Short lines assume this extra rates. If Hammond owns this Road evidently he has already bottled up this Poor Mill Co. You say timber can be bought for 30c he charges them $2.00. How is this & what will he do to us if we buy that other timber & will he not also bottle us up—What is the quality of timber. Is it old growth Yellow fir & high land spruce is there any Cedar etc. & how abt quality. How much Hemlock & what will that cost if anything—& dont you know of something better that we should have a

fine chance to succeed if we operate in competition with Portland.

Yrs.

Henry Hewitt.

Advise Bank to return deeds.

Hewitt."

On the same date, January 5th, the following letter was sent by the defendant to the Astoria National Bank:

"Astoria Nat Bank

Gentlemen:—

The Hewitt Investment Co or Henry Hewitt sent you some time ago deeds to deliver to E. Z. Ferguson on payment of $12,800 I think. The deeds it seems are faulty & Mr. Ferguson wants them changed. You will please return them & oblige.

Yrs truly,

Hewitt Investment Co.

By Henry Hewitt, J. Pt."

Here we have a correspondence which fully discloses all the terms of the contract, particularly when taken in connection with the deed which was sent to the bank. The first letter, namely that of July 24, 1905, from Ferguson to the defendant states that: "You will remember that I have corresponded with you, and also had a personal interview with your Mr. Hewitt some time since in regard to the four claims that you own in 6/6, but at that time the price that you were asking for this land was more than our parties would pay." He then proposes an exchange of certain other properties for "the four claims that you own in 6/6." This letter was answered by Hewitt by writing a note at the foot thereof

as follows: "Yours received on my return. I hardly care to trade lands. I might sell the whole bunch at $20.00 per acre. * * *"

Ferguson testifies that the lands in 6/6 were the lands described in the deed and which he gives the particular description of in his testimony. The next letter in order of time is that one written by Hewitt to the Astoria National Bank in which he says: "Please deliver the enclosed deed of lands in 6/6 west to E. Z. Ferguson, for $12,800.00, net to us, in Tacoma funds. We have notified Mr. Ferguson and he will probably call for the deed at an early date." Here is a writing referring to the land as being in 6/6, and referring to the deed containing a perfect description of it, and stating the price which is to be paid therefor.

On the same date, namely Dec. 22, 1905, Hewitt wrote to Ferguson stating: "We have today sent deeds for lands to Astoria Nat. Bk. which they will deliver to you on payment of $12,800.00."

We therefore have in writing, first, an offer to purchase the lands in exchange for other property, and an answer declining to trade, but expressing a willingness to sell the lands for $20.00 per acre; that is to say, sell the "4 claims in 6/6." As commonly understood, a claim is 160 acres, and it is well known that the figures 6/6, as used in the correspondence, means the land in Township 6 N., of Range 6 West. A reference having been made to the deed, it is perfectly proper, in order to secure a full description of the lands, to refer to the deed, and there we find four quarter sections of land in Township 6, North of Range 6 West in Clatsop County, Ore-

gon. It is true that by mistake the deed described the land as being in Township 6 South, but it stated that the land was in Clatsop County, and there is no such range as 6 South in that county, hence, it was quite evident, and quite clear from the correspondence, and the writings, which passed between the parties, what land it was the defendants proposed to sell and the plaintiffs proposed to purchase. The purchase price is also named in the writings, and therefore we have a complete note or memorandum in writing, describing the premises to be sold and expressing the consideration to be paid, signed by the party to be bound.

That the description of the lands was as described in the deeds, save that they should have been described as being in Township 6 North, instead of Township 6 South, is also made quite clear from the correspondence. For that fact is pointed out to the defendant in the letter of Ferguson of January 3, 1906, and also in the letter of January 3, 1906, to Henry Hewitt, president of the defendant, in which letter Ferguson states that "It would be best for you to prepare a new deed, making it just the same as the former deed, excepting to state that the land is in T. 6 N. R 6 W. W. M. instead of T. 6 S. as it now reads."

In response to that letter, Hewitt wrote Ferguson on January 5th, saying, "Your favor Jan. 3 received. I have written Astoria Nat. Bk. to return deeds and as you suggest, will make out new deeds. * * * Advise bank to return deeds."

Here we have again a complete reference to a perfect description of the land to be sold, and an agree-

ment to correct the deed, and also a recognition of the fact that it was necessary for Ferguson to consent to the return of the deed by the bank before it could be returned, for Hewitt concluded his letter, as we have seen, by stating, "Advise bank to return deed."

On the same date the defendant, Hewitt Investment Co., wrote to the bank, saying, "The Hewitt Investment Co. or Henry Hewitt, Jr., sent you some time ago deeds to deliver to E. Z. Ferguson, on payment of $12,800.00, I think. The deeds, it seems, are faulty, and Mr. Ferguson wants them changed. You will please return them and oblige. Hewitt Investment Co. by Henry Hewitt, Jr. Pt."

Thus, it will be seen a complete statement of the contract and the terms, the description of the land and the price to be paid are contained in the writings, and the plaintiffs did not have to, nor did they depend on oral testimony to establish the terms of the agreement.

II.

WHAT CONSTITUTES AN ESCROW?

In Watson v. Coast, 14 S. E. 249 (35 W. V. 463), it was said:

> "A deed delivered to a third person to be delivered to the purchaser on the happening of a contingency, or the performance of certain conditions on his part is a deed delivered in escrow."

Numerous authorities are cited in the opinion in support of the statement above quoted.

In Hargood v. Harley (S. C.) 8 Rich. Law 325-328, it is said:

> "An escrow is defined to be a deed delivered to a third person, to be a deed of the party on a future condition. It is to be delivered to a stranger, mentioning the condition, and has relation to the first delivery."

In Patrick v. McCormick, 10 Neb. 1, 4 N. W. 312-314, it is said:

> "An escrow is a conditional delivery to a stranger to be kept by him until certain conditions are performed, and then to be delivered to the grantee."

In Jackson v. Catlin, 2 Johns. 248-259 (3 Am. Dec. 415), it is said:

> "A deed is delivered as an escrow when the delivery is conditional; that is, when it is delivered to a third person to keep until the thing be done by the grantee—and it is of no force until the condition is fulfilled. *The condition may consist in the payment of money,* as well as in the performance of any other act."

It appears from the testimony, and it is the undisputed testimony, that the deed was sent by the defendant to the Astoria National Bank at the request of Mr. Ferguson, and that Ferguson was to have an opportunity to inspect the deed, examine the title, and if the title was found perfect, then he was to pay the money and take the deed.

On page 125 of the transcript of record, Ferguson's testimony appears as follows:

> "I think I requested Mr. Hewitt to send the deed to the Astoria National Bank. This request was made when I was in Tacoma at the time we

made the bargain for the lands * * * I told him the abstracts would have to be made, and if we found the title alright, we would pay the money. I dont know as there was any special agreement as to the conditions under which the money was to be paid into the bank. Mr. Hewitt was to send the deed over. We would have the abstract of title, and when the title was perfect, we would pay the money and take the deed."

This testimony is absolutely uncontradicted and must therefore be accepted as a fact.

If corroboration were required, however, we find it in the correspondence, for in the letter of Ferguson to Hewitt, Dec. 22d, 1905, (Pg. 82 of Transcript) the writer stated that he had "just completed the abstracts for your land. * * * We do not find any power of attorney of record from Hallie M. Lockwood. Please inform me me if you have the P. of A. and if so *send it with your deed to the bank.* * * * When can I expect the deed?"

This is positive evidence that an agreement had already been made that the deed should be sent to the bank and the title made perfect, as Ferguson testified. It is then a fact established by uncontradicted evidence that the deed was sent to the bank pursuant to agreement between the parties. The bank was not the agent of defendant, but a stranger selected by agreement of the parties to the deed and the deposit of the deed in the bank constituted an escrow.

III.

CONDITIONS OF AN ESCROW NEED NOT BE EVIDENCED BY WRITING.

That the conditions of an escrow need not be evidenced by writing, we think, is clearly established by the very great weight of authority. Thus, at page 343, Volume 11, Amer. & Eng. Enc. of Law, (2d Ed.), the rule is stated to be:

> "It has been said that some of the earlier authorities evidently contemplate that all escrows should be evidenced in writing. But the rule supported by the prevailing modern authorities, is to the effect that it is not necessary that the condition upon which the instrument is delivered in escrow be expressed in writing; it may rest in parol or be partly in writing and partly oral, and may hence be proved by parol."

and such is the rule adopted and observed by the Courts of this state.

In *Gaston* vs. *City of Portland,* 16 Or. 255, it was held that the conditions of the escrow may be established by parol and further that it is not necessary that it be agreed between the parties that the deed is deposited in escrow but that the Court will look into the facts and if the facts justify the inference that it was intended to be deposited in escrow, the Court will hold that it was so deposited. Now the case last mentioned was where the plaintiff, Gaston, proposed to the City of Portland to deed to it and dedicate as a street, a certain tract of land, provided the City would extend the street through the

property of one Kamm so as to give the plaintiff a highway to the City. There was no writing other than the deed itself, which was made out to the City and deposited with a stranger, or third party, and the question was whether or not there had been such a delivery as would pass the title and operate as a dedication. The Court held that this deposit was an escrow and that the conditions thereof might be shown by parol. At page 261, the Court said:

> "The intent of the grantor must govern, and this is to be derived from all the facts, circumstances, and proof. Nor is it necessary that the condition upon which the deed is delivered in escrow be expressed in writing; it may rest in parol, or be partly in writing and in part oral. The rule that a contract in writing *inter partes* must be deemed to contain the entire agreement or understanding has no application in such case. (Stanton v. Miller, 58 N. Y. 193)."

It follows from the foregoing that the facts establish that the deed was deposited in escrow, for it was agreed that it should be deposited in the bank and that it was deposited in the bank pursuant to the agreement between the parties is not disputed. Indeed the terms may be said practically to be expressed in writing, for the letter written by the President of the corporation, Henry Hewitt, December 12th, 1905, enclosing the deed to the bank says:

> "Please deliver the enclosed deed of lands in 6/6 West to E. Z. Ferguson for $12,800.00 net to us in Tacoma funds. We have notified Mr. Fer-

guson and he will probably call for the deed at an early date.

Y'rs truly,

Henry Hewitt Jr.

12-22-1905."

Here is a letter, subscribed, it is true, by Hewitt and not by the defendant, but it is clearly proven, indeed, is admitted that during all the time the negotiations proceeded, he was the President and principal owner of all the stock of the defendant. The deed was then deposited in escrow and could not be withdrawn except by the consent of both parties. That such is the law is stated in Volume 11, Amer. & Eng. Enc. of Law (2d Ed.), page 344, in the following language:

> "Where an instrument has been placed in escrow the transaction constitutes a contract between the parties, and such contract cannot be rescinded by the depositor alone. He cannot withdraw the escrow from the hands of the depositary at his will and without the consent of the other party, or without default in the performance of the condition. Nor can he, by subsequent instructions to the depositary, change the original transaction as where he directs the depositary to hold the instrument until conditions not mentioned in the original agreement have been performed."

It follows that the agreement of the parties that it may be withdrawn for the purpose of being corrected so as to conform to the contract and correctly describe the land, did not divest it of its nature as an escrow and in equity it will be deemed and held to be still in escrow.

In Volume 16, Cyc., Page 570, it is said:

"When the valid deposit of an instrument as an escrow has once been made, neither party can revoke without the consent of the other."

In *Grove* vs. *Jennings*, 46 Kan. 366, a deed was duly executed by the grantor and deposited in a bank to be delivered to the grantee upon the payment of the purchase price. The defendant redelivered the deed to the grantor without the authority of the grantee and the grantor conveyed the land to other parties. The time had not expired within which the grantee was allowed to pay the purchase money into the bank and become entitled to possession of the deed, hence the court held that the redelivery was unauthorized and without effect. At page 369, the Court said:

"It is next claimed that the findings and judgment of the court below are not sustained by the evidence. This we regard as the most serious question in the case. The evidence established the fact that Grove had been negotiating for the purchase of the lot in controversy before the defendant in error purchased it, and that he had knowledge of such negotiations. He understood that a deed had been executed by Coplin and wife to Grove for this lot, and deposited in a bank at Anthony; that this deed had been withdrawn from the bank by Coplin, and Grove's name had been erased and his own name inserted. The consideration had, also, been changed from $175 to $375. There was no evidence to establish the fact that the withdrawal and these erasures were authorized by Coplin and wife, or either

of them. There was no evidence to show that the redelivery by the bank to Coplin was authorized. The record is silent as to the conditions upon which the deed was to be delivered to Grove by the bank; it is not disclosed that the time had expired within which Grove would have been entitled to the deed by paying the consideration. There is no evidence to show Grove's consent to the redelivery to Coplin. Where a deed has been delivered as an escrow, subsequent instructions by the grantor to the depositary cannot change the original nature of the transaction. (Robbins v. Magee, 76 Ind. 381; 6 Am. & Eng. Enc. of Law 863.) If Grove had fulfilled the conditions upon his part, the title would have vested in him without further delivery. The contract upon the part of Coplin and wife had been executed; the title had passed from them, subject only to the performance of the conditions upon the part of Grove. (Farley v. Palmer, 20 Ohio St. 223). Now, without some evidence to show that the redelivery of the deed was authorized, and that he was lawfully entitled to it, we do not think there is sufficient evidence to uphold the findings and judgment of the trial court, and therefore recommend that the same be reversed."

Cannon vs. *Handley,* 72 Cal. 133. In this case, the plaintiff, Cannon, on December 8th, 1883, entered into an oral agreement with the defendant Handley for the purchase of a certain lot, and pursuant to oral agreement, the deed was placed in the hands of one Cox, the attorney who drew it, to hold until Cannon should pay

to him the purchase price, $1100.00. "No definite time was agreed upon or stated when the purchase money should be paid or the deed delivered." It was therefore to be done within a reasonable time. On the same day that the deed was executed, Handley delivered to the wife of Cannon a key to the house on the lot, which house was vacant. The purchase money which was to be paid to Cox was to be used in satisfying a certain mortgage, the satisfaction of which, by written instrument, executed by the mortgagee, was placed in the hands of Cox at the same time that the deed was delivered to him. On December 10th, Handley, by deed then executed, conveyed the lot in question to his brother, Thomas Handley, and Thomas paid the $1100.00 to Cox, who delivered to him the release of the mortgage, which he placed of record. Thomas demanded of Cox the deed executed to Cannon, and placed in escrow as aforesaid, but Cox refused to deliver it. On the morning of December 11th, Cannon's wife, who had been acting as his agent in the entire transaction, stated to Cox that she had heard that the father of Handley, the grantor, had some claim to the property, and instructed Cox not to forward a certain order or pass book which she had delivered to him for collection as part of the money to be used in payment of the $1100.00, until "she knew about the title." Thomas placed his deed on record and Handley, who had executed the deed to Cannon, repudiated the transaction, but the Court held that the delivery of the deed was a delivery in escrow and also held that that act could be proven by parol and that specific performance could be enforced. At page 144, the Court said:

"It is said the contract was oral, and should not

be enforced. But the deed is a note or memorandum in writing of the contract, and subscribed by the party charged, and this satisfies the statute. (Code Civ. Proc. Sec. 1973; Civ. Code, Sec. 1624, Subd. 5.) Here it is signed by the party to be charged, and there is mutuality. (Worrall v. Munn, 5 N. Y. 229; Rutenberg v. Main, 47 Cal. 213.) In Cagger v. Lansing, 47 Barb. 421, the question is decided and properly decided, that the deed is sufficient evidence to take the case out of the statute of frauds. So held under the statute of New York, which is substantially the same as that in force in this state. But it is said there was nothing in writing authorizing Cox to hold or deliver the deed. There is nothing in the statute which requires this to be in writing. The statute only requires a note or memorandum in writing as evidence of the contract. Nothing in it has reference to any arrangement for the delivery of the deed in escrow, or its subsequent delivery by the party so holding it to the grantee. The contract is fully proved herein by writing."

IV.

THE FACT THAT THE PLAINTIFF FERGUSON REQUESTED CERTAIN MATTERS PERTAINING TO THE TITLE TO BE CLEARED, DID NOT AFFECT HIS ACCEPTANCE OF THE OFFER TO SELL NOR PRECLUDE HIM FROM THEREAFTER WAIVING SUCH OBJECTIONS AND DEMANDING THE DEED.

It will be recalled, and it should be kept in mind,

that on the third day of January, 1906, Ferguson paid into the bank where the deed had been deposited, the full sum of $12,800.00. It is true that he notified the bank not to pay it over until certain defects, or apparent defects in the title to the property had been corrected, namely,

(a) Correction of the deed so that it should read Township 6, North instead of Township 6 South;

(b) Recording of a certain Power of Attorney or production of the original, and,

(c) Compliance by the grantor, the defendant herein, as a foreign corporation, with the laws of the State of Oregon.

There was nothing in these objections or suggestions inconsistent with the terms of the escrow, but on the contrary, they were entirely in line therewith and in conformity thereto. It is presumed that the grantor intends to give a perfect title, and as we have seen, a condition of the escrow was that title should be made "perfect" in Ferguson.

However, Ferguson did not insist thereafter on any of these objections other than the correction of the deed, which the defendants specifically undertook to do, both in a letter to Ferguson and in a letter to the bank. The letter to the bank was written in the name of the defendant and by it subscribed, while the letter to Ferguson was written by the President of the defendant and in both letters it was proposed to correct the deed, and in none of the correspondence which followed, was there any objection whatever made to complying with the suggestion of Mr. Ferguson regarding the Power of Attor-

ney. On the same date that Ferguson deposited the money in the bank, he wrote to the defendant and also to its president, calling their attention to these requirements, but specifically stating that he did not insist on the defendant conforming to or complying with the laws of Oregon; that he did not undertake to say that it was required so to do, but simply advised for its own protection that it should do so. He thereafter, as he testifies, and his testimony in that respect is undisputed, notified the defendant that he had examined the record and found that there was recorded in the State of Washington, the power of attorney in question, and that he could secure a certified copy of that which would be satisfactory and hence he waived that matter. It should also be kept in mind that the money was paid in by Ferguson to the bank and remained there until this suit was instituted.

Alexander vs. *Bernard,* 136 Mich. 642. The syllabus in this case is as follows:

"Deeds—Escrow—Forfeiture—Delivery.

Where deeds were placed in escrow, together with purchase-money mortgages and notes, to be delivered to the purchaser and seller, respectively, upon the payment of a stated sum at a certain time, and the payment was duly made, a demand by the purchaser that the mortgages and notes should not be delivered until the title should be cleared from incumbrances, did not prevent her from afterwards insisting upon a delivery of the deeds according to the terms of the escrow."

In Alexander vs. Bernard, the deed to the property

bargained, was executed and delivered in escrow to Bernard, who was cashier of a certain bank. The grantee therein named, Alexander, was required to pay to the bank, certain money within certain times. The attorney for Alexander objected to the title and wrote to Bernard a letter, calling his attention to what he claimed were defects in the title. With the deed had been deposited a certain note and mortgage, executed by Alexander to the grantor, a Mrs. Vandercook, and in such letter he stated:

> "Mrs. Alexander * * * does not consent to a withdrawal of said deeds from escrow, but, if Mrs. Vandercook demands them, instead of taking measures to have said incumbrances and tax title liens and clouds removed, and perfect the title, which said deeds declare to be free from all incumbrances whatever, and are warranted same, you can exercise your own judgment as to the delivery of them back to Mrs. Vandercook. But a recall of said deeds will be at her peril, etc."

Some time thereafter, however, Mrs. Alexander notified Bernard that all objections to the title were withdrawn and demanded the deeds. Prior thereto, however, Mrs. Vandercook had caused a notice to be served on Mrs. Alexander to the effect that as she had objected to the title, contract was forfeited and Bernard was instructed to return the $237.17 that had been paid to him by Mrs. Alexander on account of the purchase price and to return the deeds. At page 646, the Court said:

> "The complainant never desired the notes and mortgages back nor did she desire to rescind the

contract. She made all the payments as required. It is true that, under the advice of counsel, she did for a time insist the notes and mortgages should not be delivered until the title was perfected. She never refused to take a perfect title, and, after getting other counsel, she changed her mind about taking the deeds that were left with Mr. Bernard, and offered to take them. There is nothing shown by the record to prevent her from asserting the right to a delivery of the deeds."

The case of *Regan* vs. *Howe,* 121 Mass. 424, is also applicable.

In this case, the grantor executed a deed and left it with the attorney who drew it, to be delivered to the grantee, upon the performance of certain conditions, namely, grantee, Howe, was to pay $300.00 and satisfy a certain mortgage for which the grantor was responsible. It was over a year thereafter before the money was paid and the mortgage satisfied, but the grantee did both finally. Thereafter the grantor obtained possession of the deed by representing to the party who held it in escrow, that she intended to deliver it to the grantee. She never did so.

The Court said at page 426:

"There was evidence that the conditions, upon which the deed was to be delivered to the grantee, had been fully performed, so that the equitable title to it was in the grantee; that the scrivener, in discharge of his trust, intending to complete its delivery, gave it to the petitioner herself to carry and deliver to the grantee, and that she took it away de-

claring that she took it for that purpose. That is enough to constitute a delivery, if subsequently accepted as a delivery by the grantee. It is not necessary, as between the parties themselves, even when both are present, that the deed should be placed in the actual custody of the grantee, or of his agent. It may remain with the grantor, and it will be good, if there are other acts and declarations sufficient to show an intention to treat it as delivered. The significance of the acts or declarations relied on will be greatly strengthened where the deed is placed in the hands of a third person, by the fact that the conditions upon which the delivery of the deeds depends have been fully performed. The destruction or detention of the deed by the grantor, after such delivery, cannot divest the grantee's estate."

Now applying the authorities above quoted to the case at bar, it would seem that the right of the plaintiffs to recover is clear. There was a deposit of the deed in escrow and there was a clear acceptance of the terms and conditions of the deposit. Ferguson paid promptly to the bank the $12,800 and the questions he raised merely required the performance of certain acts by the grantor, all of which were easily within its power and which were deemed necessary to perfect the title, for instance, the fact that the deed by mistake described the land as being in 6 "South" instead of 6 North was clearly a matter that Ferguson had a right to insist on having corrected. The only other two questions raised by him were first, whether or not it was necesasry for the defendant

to qualify as a foreign corporation, but in the letter he wrote to the grantor he distinctly stated that he did not make that a condition, he only suggested it in its own interest. The other matter he inquired about was as to the existence, in point of fact, of a power of attorney which it did not appear had been recorded. The evidence is undisputed that thereafter he discovered the existence of this power of attorney and waived any objections on that score. As stated in the California case above quoted from, Ferguson never objected to taking a perfect title, and the inquiries he suggested were perfectly legitimate and proper. Here then, is a case where a deed was deposited in escrow and the conditions of the deposit were complied with promptly by the grantee and the money paid in to the bank. The deed was withdrawn pursuant to an agreement between the parties for the purpose of having the erroneous description corrected and for no other purpose. It seems clear that the plaintiffs upon the payment of the money into the bank, became the equitable owners of the lands in question, and hence are entitled to have their title thereto established by a decree of court.

V.

OTHER TIMBER LANDS.

A contention is made by defendant to the effect that the sale of the lands in controversy was conditioned on Ferguson securing for the defendant certain other lands. That this contention is entirely an afterthought is clearly demonstrable from the letters and writings that passed between the parties. For instance: On July

24th, Mr. Ferguson wrote to the Hewitt Investment Company asking if it would be willing to trade the lands in controversy, for other lands in Columbia County, being the very lands which Henry Hewitt now contends were to be secured for the defendant as a part of the deal, but to that letter, Hewitt answered as follows:

> "Yours received on my return. I hardly care to trade lands. I might sell the whole bunch at $20 per acre."

Now $20.00 per acre is exactly what the plaintiff finally agreed to pay, namely $12,800 for four claims of 160 acres each, or 640 acres in all, at $20.00 per acre is $12,800. Negotiations continued for some time orally and by letter when finally, on December 22, as shown by the letters above set forth, Hewitt wrote to the bank enclosing the deed by the defendant to the lands in controversy with directions to deliver the same to Ferguson upon the payment of $12,800 net in Tacoma funds, but said not one word about any other lands. On the same day, he wrote to Ferguson saying:

> "We have today sent deed for lands to Astoria N. Bk. which they will deliver to you on payment of $12,800 and I will send you a check for commission when money is received of 2½ per cent. Our directors will not allow more and in fact did not like to deed the land at all. We consider this land worth 30,000. However, if you can find us the land you promised, will send my son or some other good cruiser to look over the lands and *in some way make good my promise to you.* Now hustle and find the other land. It must be comatible and good loging chance finally."

Now this shows that the matter of securing the other lands was entirely a separate deal, namely, as Ferguson testifies in the course of negotiations, he had suggested that they could buy some cheap lands. It is clear from the above letter alone that the lands had not been found or located, but that a certain class of lands Hewitt wanted to buy if he could get them located just to suit him, and in that case he was evidently going to pay Ferguson a commission, for he says that he will, in case such lands are found, "in some way make good my promise to you," that is, regarding commissions. But the deed was not delivered or to be delivered on any condition that other lands satisfactory, should be found. That this was purely a separate proposition is also clearly indicated in the letter of Ferguson to the Hewitt Investment Company of January 3, 1906, above quoted in which, he concludes his letter with a discussion of the commission by finally saying, "I will, of course, take the lands anyway." Here, we may remark, is a clear, positive and unequivocal acceptance of the proposition to purchase the lands in controversy and taken in connection with the fact that Ferguson had already paid the $12,800 into the bank should be conclusive on that matter. In this same letter, however, he further says:

> "You can inform Mr. Hewitt that I will probably send him today or tomorrow, maps and data regarding the other timber proposition that I talked with him about. I think that one of them at least will appeal to him."

This shows also that the other proposition was entirely separate and had not yet been even entirely out-

lined or the location of the lands determined upon. Now, on January 5th, 1906, in a letter above set forth, Hewitt states that he has written the bank to return the deed for correction. He then proceeds to discuss the other lands, data of which had evidently reached him by that time, for he says:

> "The Red and Black look good providing the mill gets rates to Eastern Points same as Portland —Do the Oregon Short Lines assume this extra rates. If Hammond owns this Road evidently he has already bottled up this poor mill.

Finally, in closing his letter, Hewitt says:

> "Dont you know of something better that we should have a fine chance to succeed if we operated in competition with Portland?"

What more is necessary to show that this matter of purchasing other lands was entirely a separate proposition and was in no wise a condition of the sale of the lands in 6/6.

VI.

THE DEED WAS WITHDRAWN FROM THE BANK SOLELY FOR THE PURPOSE OF CORRECTING IT.

That such was the fact is also established by the correspondence. Thus, under date, January 5th, 1906, in the letter last quoted from Hewitt to Ferguson, the former says:

> "Your letter Jan. 3 received. I have written Astoria Nat. Bank to return deeds, and as you suggest will make out new deeds. Mr. Griggs has the old Hattie Lockwood deeds signed by him as power

of attorney, and will send new deeds for her to sign. It will take some little time. * * * Advise bank to return deeds."

Now this was in response to Ferguson's letter of Jauuary 3rd written to the company, and also one on the same date written to Hewitt personally, both of which letters are above set forth. In both of these letters, Ferguson called attention to the fact that the land is described in the escrow deed, as being Township 6 South instead of 6 North. On the same date that Hewitt wrote to Ferguson saying that he would have the deed corrected, he wrote to the bank as follows:

Astoria Nat. Bank.

Gentlemen: The Hewitt Investment Company or Henry Hewitt sent you some time ago deed to deliver to E. Z. Ferguson on payment of $12,800 I think. The deeds it seems are faulty and Mr. Ferguson wants them changed. You will please return them and oblige,

Hewitt Investment Company,
By Henry Hewitt J. Pt.

After the Company got it back, however, it changed its mind and concluded to retain it and refused to redeliver it. This is admitted in the answer.

VII.

DEFENDANTS' CONTENTIONS.

The defendants' first contention is that "the terms of the contract do not appear from the written evidence introduced.

In support of this contention and in order to make

it appear plausible, counsel for defendants, in their brief, proposed to eliminate entirely from consideration the following letters:

The letter of July 24, 1905, from Ferguson to the Hewitt Investment Company.

The letter of September 25, 1905, from Ferguson to the Hewitt Investment Company.

The letter of January 3rd, 1906, from Ferguson to Astoria Bank.

The letter of December 22, 1905, from Ferguson to Henry Hewitt, Junior.

The letters of July 24th and September 25th, counsel say, "may be laid aside having resulted in nothing." We do not agree with this contention by any means. The letter of July 24th we deem of very great importance. That letter is not addressed to Mr. Hewitt, as counsel mistakenly state in their brief on page 15, but is addressed to the Hewitt Investment Company. It calls attention to the fact that the writer "had a personal interview with your Mr. Hewitt some time since in regard to the four claims that you own in 6/6"; that the price then asked was more than his people cared to pay. The writer, Mr. Ferguson, then proposed to exchange certain lands for the 4 claims in 6/6. This letter was addressed to the Hewitt Investment Co. and was answered by Henry Hewitt, Jr., who, as it clearly appears from the evidence, was practically the sole owner of the corporation, and was its President and Manager. He answered that letter by endorsing at the foot thereof, the following: "Yours received on my return. I hardly care to trade lands. I might sell the whole bunch at $20.00 per acre.

It is heavily timbered will average from 6 to 9 M per claim. One claim somewhat burnt."

Observe: "Yours received on my return." He was the corporation.

Here is a distinct offer to purchase and an offer to sell, and these letters constitute the opening of the negotiations. They are certainly quite important to the present inquiry, and will be found at pages 56-57, Transcript of Record.

The letter of September 25, 1905, which appears at page 130 of the transcript, was written by the plaintiff, Ferguson, to the Hewitt Investment Co. in reply to the answer last above quoted. It is important because it refers to that answer, and contains an offer of $8000.00 for the 4 claims, shownig a continuation of the negotiations.

The letter of December 22, 1905, from Ferguson to Henry Hewitt, is of itself probably not of special importance. It shows, however, that the negotiations commenced in September, were still being continued.

The next letter to which they object is that of January 3, 1906, from Ferguson to the bank, appearing on page 48 of the Transcript. This letter is important only in showing that on receiving notice from the defendant of the fact that it had forwarded the deed to the bank, Ferguson made the deposit of the purchase price with the bank and notified it that he would take delivery of the deed exactly in accord with the terms of the escrow agreement, namely, as soon as the title was perfected. He called the attention of the bank to the fact that the land was described as being in Township 6 *South* instead of

Township 6 *North*. We think this letter important to the inquiry.

The next letter, which counsel contends should be eliminated, is that of January 8th from Ferguson to Hewitt. This letter is quite important in view of the fact that it shows that Ferguson complied with the request of Hewitt to have the bank return the deed. It should be kept in mind that by his letter of January 3rd to the Hewitt Investment Company, Ferguson called its attention to the fact that the deed did not accurately describe the land, as it described it as being in Township 6 south instead of Township 6 north, and suggested the necessity of correcting it. Whereupon, on January 5th, Henry Hewitt, Jr., answered the letter of Ferguson to the Hewitt Investment Company and stated that he had written to the bank to return the deed, saying, "as you suggest will make out new deeds," and closed the letter by requesting Ferguson to "advise bank to return deeds."

In the letter of January 8, 1906, of Ferguson to Hewitt, which counsel proposes to eliminate, Ferguson said, "Replying to your favor of the 5th, I have to say that the bank has informed me that they would return the deeds to you by tonight's mail. I suppose it will take two or three weeks to get them straightened out. In any event, the money will be left at the bank for you as soon as the title is completed." This shows not only an agreement to correct the deed, but also the fact that it was recognized by both parties as having been deposited in escrow and could only be returned by the bank pursuant

to the request of both parties, and that it was at the request of both parties that it was returned.

The letter from the bank to the Hewitt Investment Co. of January 9, 1906, on page 50 of the Transcript, which counsel for defendants contend should also be ignored, we think is important, as it also shows that the deed was returned for correction only at the request of both parties. It also shows that the $12,800.00 was still held by the bank to be paid to the defendant when the deed should be corrected and the title made perfect.

VIII.

AS TO DEFENDANTS' CONTENTION THAT THE EVIDENCE DOES NOT PROVE THAT THE LAND WAS BEING PURCHASED FOR THE BENEFIT OF PLAINTIFF CORPORATION.

It is contended by defendant in its brief, at page 22, that there is no evidence showing that the plaintiff corporation was the real purchaser of the property, and at page 23 of the brief, it is stated that "No proof whatever of the allegations in this respect will be found in any writing to be found in the record, nor are they established by the oral testimony of witnesses at the trial.

The testimony of Mr. Ferguson was positive and direct to the point that the money, the $12,800.00, was provided by the plaintiff corporation, and that the land was purchased for it. He also testified that he so notified the defendant during the negotiations. His testimony to that effect will be found at page 69 of the Transcript, where he testifies as follows:

"I informed Mr. Hewitt that the Minnesota &

Oregon Land & Timber Company was purchasing the land. I told him that I was a stockholder in the company, but was buying the lands for the company."

In this connection it is material to observe that several letters of both parties discuss the amount of commission Ferguson was to be allowed. If he was purchasing for himself why was he allowed a commission?

Furthermore, in the letter of July 24, 1905, which Ferguson wrote to the defendant he calls attention to the fact that the previous price which they had placed on the lands was deemed by his people too much, his language being: "At that time the price you were asking for this land was more than *our parties* would pay," which corroborates Ferguson's oral testimony that defendant understood he was representing the plaintiff corporation.

Hence, it appears that counsel are in error in contending that there is no testimony in the record in support of the averment in the bill that the land was purchased for the plaintiff corporation. That such corporation supplied the money is undisputed and must be taken as a fact proven. It is true that Hewitt denied in his testimony that Ferguson informed him that he was acting for the corporation, but, as stated, Ferguson is corroborated by his letters and the fact that he was being allowed a commission. Whether he did or not, however, we deem really immaterial, for we understand the rule to be that an undisclosed principal can take advantage of and enforce the contract of his agent. It is stated in the brief of defendant that "every one has a

right to select with whom he will contract and cannot have another person thrust upon him without his consent," and authorities are cited in support of that proposition.

That such is the general rule may be admitted, but the rule has no application to contracts made by an agent for an undisclosed principal. Section 528 of Clark & Skyles' on the Law of Agency states the rule as follows:

> "It is a well settled general principal of the law of contracts, subject to some exceptions, or apparent exceptions, that a contract cannot confer rights on a person who is not a party to it, so as to enable him to sue in his own name for its breach, for a person has a right to say with whom he will enter into contracts; and it has been contended that this principal prevents an undisclosed principal from maintaining an action on a contract. The contrary, however, is now well settled on the ground that by reason of the fiction of identity of principal and agent, the undisclosed principal becomes a party to the contract through his agent."

And at Section 29 the same author says:

> "The doctrine that an undisclosed principal may maintain an action on a contract is not limited to oral contracts, but applies also to contracts in writing other than contracts under seal and negotiable instruments."

IX.

INCORPORATION OF PLAINTIFF CORPORATION.

On page 23 of defendants' brief it is stated that it appears by appellee's own evidence that appellee cor-

poration was not in existence at the time of the transaction, because it is stated that Ferguson testified, as shown on page 58 of the Transcript, that "We were purchasing for the parties, who afterwards formed the Minnesota & Oregon Land & Timber Company."

Very clearly that testimony refers to negotiations had prior to July, 1905. Ferguson was speaking of purchases of lands he had been making prior thereto in the vicinity of the lands in question, from other persons. He had no reference to the negotiations for this particular land. At page 69 of the Transcript, he testifies regarding the negotiations for the lands in question that, "I informed Mr. Hewitt that the Minnesota & Oregon Land & Timber Company was purchasing the land. I told him that I was a stockholder in the company, but was buying the lands for the company."

Surely, counsel have allowed themselves inadvertently to make this apparent misrepresentation of the testimony. Indeed the incorporation of the plaintiff corporation at the time of the negotiations is admitted in the record. The allegation in the bill of complaint is:

> "That the plaintiff, Minnesota & Oregon Land & Timber Company, is and at and during all the times hereinafter mentioned, was a private corporation organized and existing under the laws of the State of Minnesota, etc."

At page 74 of the Transcript of Record, it appears "that it was considered admitted that the plaintiff is a corporation and had authority to purchase the land."

As a matter of fact, the admission was broader than appears in the transcript of record, for a reference to the

transcript of testimony on file in the Court below will show that, reference being had to the plaintiff corporation, the admission was in the following words:

> "It may be considered admitted that it is incorporated *as alleged* and has authority to purchase the timber."

As above stated, it is alleged in the bill of complaint that the corporation plaintiff was incorporated during all the times therein mentioned, which covered the period of negotiations, and the admission being that it was incorporated as alleged, entirely does away with defendants' contention.

X.

CAN THE DEED BE CONSIDERED FOR THE PURPOSE OF ASCERTAINING THE TERMS OF THE CONTRACT?

It is contended by defendant that the deed which was executed and placed in escrow cannot be considered or resorted to for the purpose of establishing or ascertaining the terms of the contract. In support of this contention, counsel cite a number of authorities to which we will later on refer more specifically. An examination of these cases will disclose that they simply go to the proposition that the mere execution of the deed, pursuant to a parol agreement, is not a compliance with the statute of frauds. In other words, that a deed which does not set forth the contract is not sufficient of itself to establish the contract, so as to take a case out of the statute of frauds. Our contention is, and we think the authorities fully sustain us, that a contract which the

statute requires to be in writing, expressing the consideration and delivering the land, need not be embodied in one writing, but may be proven by any number of writings, which taken together, clearly disclose the terms of the agreement. Hence, a contract or agreement may be established by letters and written correspondence, and if reference be made in such letters or correspondence to a deed which has been executed, then such deed may be read and considered in connection therewith. This proposition we do not think any authority cited by counsel disputes. The cases cited by counsel for defendant all refer to an "undelivered deed." A deed delivered in escrow is not "an undelivered deed." The deeds referred to in the cases cited by counsel, as we shall see, had been either retained by the grantor or delivered to his agent only, and in that respect the situation differed entirely from the one we are considering. Nor do we wish to be understood as admitting that the weight of authority is that an executed deed of itself may not be a sufficient memorandum to take the case out of the statute. It is not necessary, however, for us to discuss that question, for here the deed was not only delivered in escrow but was referred to in numerous other writings signed by the parties and thereby made a part thereof.

KOPP VS. REITER, 34 N. E. 972, is the first case cited by counsel in support of their contention that the deed cannot be considered. The case does not support that contention, but, as we view it, squarely supports plaintiff's contention. It is true that the court held that the deed of itself was not a sufficient memorandum

of the contract to satisfy the statute of frauds, but at page 944, the court said:

> "It is true that an undelivered deed is sometimes resorted to in order to help out the requirements of the statute of frauds, but it can hardly be said that the circumstances under which such a deed can be used are disclosed by the facts in the present record * * * Where the owner of the land has signed a certain contract of sale, *or some writing amounting to such a contract,* but has failed therein to properly describe the property, a deed executed by him, but not delivered, may be looked to as a part of the transaction and may be made to aid the prior agreement and secure its enforcement by supplying the defect in such description."

So here, it is contended by defendant that the memorandum in writing, which consists of numerous letters passing between the parties, did not sufficiently describe the land. This is one of the propositions urged in their brief, and is stated on page 25 thereof. We think the correspondence itself sufficiently describes the land because it refers to the "four" claims owned by the defendant in "6/6." This language is readily understood as meaning the four quarter sections owned by the defendant and located in Township 6 north of Range 6 west of the Willamette Meridian, and we have no doubt the court will so construe it. Such description was used by both parties and is contained in the letter written by the defendant to the bank in transmitting the deed, as appears at page 47 of the transcript. In that letter,

the president of the corporation defendant said, addressing the bank: "Please deliver the enclosed deeds of lands in 6/6 West to E. Z. Ferguson for $12,800 net to us, in Tacoma funds. We have notified Mr. Ferguson and he will probably call for the deed at an early date."

On the same date, the same party wrote to Ferguson calling his attention to the fact that the deed had been sent to the bank. This correspondence brings this case clearly within the rule above quoted from Kopp vs. Reiter, for it is a case "where the owner of land has signed a written contract of sale, or some writing amounting to such a contract," and if it be true that the writings so signed, namely, the letters, do not describe the land accurately, then, to continue the quotation, "a deed executed by him, but not yet delivered, may be looked to as a part of the transaction * * * * * * by supplying the defect in such description."

WIER VS. BATDORF, 38 N. W. 22.

This is the second case cited by counsel and is equally inapplicable in support of their contention, and equally applicable in support of our contention. In this case, the contract for the sale of the real estate was entered into by parol, and a deed was made by the grantor and left in the hands of *his* agent to await the arrival of the money of the grantee. It was held that there had been no delivery of the deed, and that it was not available as a memorandum of the contract.

The court considered and commented on the case of Thair vs. Luce, 22 Ohio, St. 62, saying:

"It will be observed that in the case cited the

memorandum was sufficient except in failing to describe the property sold, and the court treated the acceptance of the terms of the deed by Fuller as the completion of the contract and as identifying the property sold."

The court then quoted from the Ohio decision showing that the Ohio court had looked to the deed for the description of the premises; the memorandum in writing failing to give the description. Thereupon, at page 4, the court said:

"If the facts in the case under consideration brought it within the facts of the Ohio case, we would have no hesitancy in enforcing the contract."

Thus the court held in *Weir* vs. *Batdorf,* as did the court in *Kopp* vs. *Reiter,* that if there existed a question as to the sufficiency of the description in the written memorandum, an undelivered deed forming part of the transaction might be considered for the purpose of ascertaining the true description.

SWAIN VS. BURNETT, 89 Cal. 564, is the next case cited and all that was held in that case was that "An undelivered deed executed in pursuance of an oral agreement of sale cannot be regarded as *sufficient* memorandum to satisfy the statute of frauds, unless it is shown to have contained a memorandum of the oral agreement." We are not contending that the deed of itself is a "sufficient" memorandum, for it is not necessary so to do in this case, but many authorities so hold, but we are contending that the deed may be considered in connection with other written memoranda.

HALSELL VS. RENFROW, 78 Pac. 118, is the next case cited in defendant's brief and is quoted from at some length. The decision is by the Supreme Court of Oklahoma. Renfrow was supposed to be the owner of a certain 40-acre tract of land in Oklahoma County, which he placed in the hands of one Shields, for sale. The authority of Shields was not expressed in any writing, and he was without authority to make a contract of sale; his sole authority being to procure a purchaser at the named price of $10,000.00. Renfrow lived in Missouri. Shields offered the property to Halsell, who agreed to take it at the price named, and paid Shields $500.00 on account of the purchase price. Whereupon, Shields notified Renfrow by wire, that he had "sold the 40 acres, $10,000.00 cash, $500.00 forfeit." To this wire Renfrow repiled, "I confirm sale by you, $10,000. $500.00 forfeit." Thereafter, Renfrow went to Oklahoma and met the plaintiffs and all subsequent negotiations were carried on personally and orally. It was discovered that Renfrow had conveyed a portion of the property to one Compton, had made a lease of the entire tract to one Springstine, who was in the actual possession and refused to surrender. Renfrow proposed to deliver the deed for all except the Compton lot, for which he proposed to make a deduction of $200.00 from the purchase price, and give such present possession thereof as he had, and full possession as soon as he could obtain it, or pay the expense of an action to secure possession from Springstine. Halsell agreed to the $200.00 deduction, *but refused to take the deed, or pay the pur-*

chase money unless Renfrow would give him possession at once. Renfrow then returned to Missouri without agreeing to deliver possession at once. From Missouri he wrote to Halsell stating that he had mailed to the Western National Bank a deed to the tract of land, and had "instructed the bank to turn the same over to Halsell upon the payment of $9500.00 for Renfrow and $500.00 to the credit of Shields, and stated that "I shall expect this to be done between banking hours on Wednesday, the 27th inst. * * * * I have concluded that I will bring this matter to a close at once, and shall give you the opportunity of taking up the deed on Wednesday or will consider the proposition at an end."

Thereupon, on the 27th, Halsell tendered to the bank $9800.00, conditioned upon the delivery of the deed, and *immediate possession* of the premises, and the bank refused the tender. Thereupon, Halsell wrote to Renfrow reciting what he had done and demanding delivery of the deed, and immediate possession of the land. Renfrow answered, stating in substance, that Halsell well knew that he was unable to give immediate possession, and that he could not undertake to do so, and thereupon terminated all negotiations. It will be seen that Halsell and Renfrow never reached a definite agreement. Halsell constantly demanded immediate possession and Renfrow, being unable to give it, as constantly declined. The Supreme Court of Oklahoma held that the writings did not constitute a sufficient memorandum to take the case out of the statute, and also held the parties never reached a definite agreement as to the terms of the sale.

It was intimated by the Oklahoma Court that the deed could not be looked to for the description, but this proposition seems not to have been definitely decided. The court simply said: "While there are a few cases holding that an undelivered deed may be looked to to supply a description, they are cases where there had been an exchange of lands, and one or both parties had taken possession, but the general rule is that an undelivered deed forms no part of the transaction, and cannot be looked to to supply any omission in the writings that have passed." The court thereupon cited several cases in support of that statement, no one of which supports it, all being cases where there was no writing other than the deed, and not one of the cases, so far as we have been able to discover, asserts the doctrine that in no circumstances can a deed be considered in connection with other contemporaneous writings. The court concludes that branch of the case by saying: "But in view of the particular facts in this case, we do not deem it important whether this deed could or could not aid the agreement. It is a conceded fact that the description in this deed was not a correct one, and both parties repudiated it. It embraced the Compton lot. * * * * * The further contention is made that the deed sent to the bank by Renfrow contained a correct description, and that it can be looked to to supply the description. If this could be permitted under the authorities cited, supra, it would not entitle plaintiffs to recover in this action. If the writings alone are to be held as sufficient memorandum to take the agreement out of the statute of frauds, and

we do not think they do, then it would appear from such deed that the consideration to be paid was $10,000.00, and the plaintiffs never tendered or offered to pay but $9500.00. It is true that it is claimed that Renfrow agreed to deduct $200.00 on account of the Compton lot being deducted from the land, but this was a parol agreement."

It will thus be seen that there were two deeds in question, one deed containing an inaccurate description, which was abandoned and withdrawn, and another deed containing a correct description, but not containing a correct statement of the purchase price. Thus, it will be seen that the court did not distinctly hold that a deed which contained a correct description of the land might not be looked to or considered in connection with other writings. However, we have no hesitancy in saying that the decision of the Oklahoma Court in Halsell vs. Renfrow, so far as it intimates that a deed may not be considered at all in connection with other writings relating to the same transatction (if properly construed it does so intimate), is opposed to the great weight of authority. Also, we think it quite clear that the Court was wrong in holding that the writings were not of themselves sufficient to take the case out of the statute had they shown that the parties reached a definite agreement. The case finally went to the Supreme Court of the United States, 202 U. S. page——, (50 Law. E. D. 1032). It was affirmed, but distinctly and solely on the ground that the writings showed that the minds of the parties did not meet, for while Halsell demanded im-

mediate delivery of the premises, Renfrow declined constantly to agree thereto. The court entirely ignored the question as to the sufficiency of the writings to take the case out of the statute.

NICHOLS VS. OPPERMANN, 34 Pac. 162, decided in the Supreme Court of Washington is next cited. In that case there was no writing expressing the contract, nor had there been any correspondence between the parties relative to the contract. It was claimed that an oral agreement of sale had been entered into and that pursuant thereto, a deed had been executed and deposited with a third party to be delivered to the plaintiff upon the satisfaction of a certain mortgage th upon the land. The court at page 163 said:

> "The condition upon which a deed is delivered in escrow may rest in and be proven by parole. This is as far as the rule extends, and it pre-supposses a valid contract * * *. To constitute a deed there must be a delivery to the grantee personally, or to some third person for him. A deposit of a deed with a third person, to be delivered to the grantee upon the happening of some future certain event, has been held sufficient to constitute the deed an escrow, and control of it in such a case has passed out of the grantors hands. * * * Where there exists a previous valid contract to convey, the conditions upon which the deed is deposited may rest in and be proven by parole. * * In the case at bar, there was no written contract to convey the lands, nor had possession thereof been

transferred, so as to constitute a part performance of a parole contract to render it valid."

It will be seen that there was no writing whatever, other than the deed itself. The case went up on exceptions to the refusal of the trial court to admit oral testimony of the contract. The case was affirmed by a majority of the judges. Mr. Justice Hoyt, one of the most distinguished and able jurists the State of Washing has ever had, dissented, holding that, "The negotiations between the parties should have been allowed to be shown as tending to explain the conditions upon which the deeds were to be delivered." This statement by Justice Hoyt, we think, is clearly supported by the weight of authority, but be that as it may, the decision of the majority of the Court has no application to this case except insofar as it supports our contention that the terms or conditions of an escrow may be established by parol. It is not held that the deed may not be resorted to for the purpose of ascertaining the description of the property, or otherwise referred to in connection with other writings. It was simply held that oral evidence could not be received to show the consideration or terms of the sale.

Counsel for defendant, in their brief, constantly reiterate, as at page 30 thereof, the statement that the writings introduced in evidence "do not express the modified bargain proposed by Ferguson that the title should be perfect of record." They doubtless refer to the letters of January 3, one to the Astoria National Bank (Transcript, 48), one to the Hewitt Investment

Company (Transcript 61), and one to Henry Hewitt (Transcript 65), written by Mr. Ferguson. Reference to those letters will show that Mr. Ferguson insisted on nothing that was not warranted by the conditions of the escrow and that he proposed no "modified terms." He called attention in all three letters to the fact that the land was described as being in Township 6 South instead of Township 6 North, and he asked in the letter to Hewitt that a new deed be executed the same as the old one, excepting in respect of that description. He called attention to the absence apparently of a power of attorney and to the failure of the company to comply with the Oregon laws regarding foreign corporations. He stated distinctly, however, in his letter to Hewitt that the failure to comply with the laws of Oregon in regard to foreign corporations would not interfere with the deal and that he simply called attention to it for their own good. The testimony further shows, and that fact is undisputed, that Ferguson thereafter notified Hewitt that he had found the power of attorney and there was no further objection on that ground. But counsel urge that Ferguson had no right, under the terms of the contract as disclosed by the writings, to "insist on a perfect record title." We again call the attention of the court to the fact that Mr. Ferguson testified, as appears at page 125 of the Transcript, that the deed was sent to the Astoria National Bank at his request and pursuant to an agreement between the parties. Mr. Ferguson's testimony was:

> "I think I requested Mr. Hewitt to send the deed to the Astoria National Bank. This request

was made when I was in Tacoma, at the time we made the bargain for the land; he said he would have it fixed up and have a meeting of the Board of Directors, and he told me the whole thing; that he and his son owned all the stock. I told him the abstracts would have to be made, and if we found the title was alright, we would pay the money and take the deed. * * * Mr. Hewitt was to send the deed over, we would have the abstract of title made and when the *title was perfect* we would pay the money and take the deed."

Now, this testimony is undisputed. Mr. Hewitt nowhere contradicting. Hence, by the escrow agreement, Mr. Ferguson was to have the right to examine the deed and the title, and if found "perfect," to pay the money and take possession of the deed.

It is worthy of note also that in all the correspondence between the parties regarding the title, no question was made touching the right of Mr. Ferguson to call for a perfect title, but on the contrary, it was recognized as his right and as a part of the agreement. The minds of the parties met fully as to the terms of the contract, and this is disclosed very satisfactorily and clearly by the correspondence.

XI.

CONCERNING THE CONTENTION OF DEFENDANT THAT THE AGENT WHO NEGOTIATED THE SALE WAS NOT AUTHORIZED THEREUNTO IN WRITING.

It is next contended in the brief of the defendant that

the sale was negotiated by Henry Hewitt, Jr., and that he was not thereunto authorized in writing. Mr. Justice Wolverton, who tried the case below, disposed of that contention in the following language:

> "I am not favorably impressed with the defense as elucidated by the testimony, that the Investment Company was not authorized to execute the deed. Henry Hewitt, Jr., was in control of the entire business of the company and he and his son, J. J. Hewitt, and perhaps his wife, were the owners of practically the whole of the capital stock. J. J. Hewitt, the son, was secretary. The by-laws of the company would seem to authorize the president, with the approval of the other members of the finance committee, such committee consisting of the president and two other members of the board of directors to buy and sell real property without further specific authority from the board. By Article 7 he is made general manager 'with full power to buy real estate, or anything which the company is entitled to hold, buy, and sell, subject to the approval of the finance committee;' and by Article II, it is made the duty of the Finance committee 'to advise with and approve the purchases and sales made by the president.' Evidently, Henry Hewitt, Jr., has conducted the business of the company as though he were vested with full power to do the things requisite to the purchase and sale of real property, all in the name of the company, and his conduct in connection with the transaction now in controversy was in accord with such practice. Under

such conditions and practice, the Hewitt Investment Company ought to be and is estopped to deny the authority of Hewitt to enter into the contract or agreement in question to execute with the secretary the deed necessary to convey the title."

Henry Hewitt, Jr., the president of the corporation, had for many years managed and conducted the business of the corporation without consulting any other person. At the time the deed was executed, there were three directors, namely: Henry Hewitt, his wife and his son, J. J. Hewitt. The deed was executed in the name of the corporation, by Henry Hewitt, Jr., as president, and J. J. Hewitt, as secretary, hence, a majority of the Board of Directors signed the deed. At page 141 of the Transcript of Record, it will be seen that J. J. Hewitt, referring to the execution of the deed, said:

"I left the determination of those matters to my father and acted as he decided, as he had a majority or practically all of the stock. I do not know what become of the deed when it was returned to be corrected. I have not seen it since."

And at page 143 of the Transcript of Record, said J. J. Hewitt further testified:

"I came home after two or three months. Mr. Hewitt, my father, said there is a deed to sign; he was president of the company; I asked him what it was and he said that he had a deal on with Ferguson to trade the lands, and I signed the deed, and it was sent down there, and the next thing I knew the deed came back for correction of the title, or

something, and the matter, so far as I was concerned, was dropped. I think the other director then besides myself and my father was Rocena L. Hewitt, my mother. I think there were but three directors at that time."

At page 103 of the Transcript, Henry Hewitt, Jr., testified as follows:

Q. Who are the directors or trustees now?

A. Why I think there is just the three. We haven't had the meetings on the plan of those that were elected.

Q. What three are there?

A. It is myself and John and my wife, I think.

And at page 104, he testified that he consulted his wife. It is true that he changed his testimony so frequently, and was so contradictory and inconsistent in his statements that it is difficult to say what his testimony is on any particular point, but it is very clear from the whole that he consulted his wife and she knew about the deed being made.

It is equally clear from the testimony of J. J. Hewitt that his father and mother and himself constituted the Board of Directors.

Article VII of the By-laws of the corporation is as follows:

"The president shall preside at all meetings of the Board of Directors, sign all notes or evidence of indebtedness, deeds, mortgages and all other legal papers of the corporation. He shall be general manager of the corporation, with full power

to buy real estate, notes, bonds or other evidence of indebtedness, or anything which the company is authorized to hold, buy and *sell,* subject to the approval of the finance committee, of which he shall be chairman."

Article XI provides that the finance committee shall consist of the president and two other members of the Board of Trustees. In the evidence and generally throughout the case, the board of trustees are referred to as the board of directors. Under the statute of the State of Washington, the governing body of a corporation is known as the board of trustees, and where the word "director" is used in this brief and in the evidence, trustee is meant. It will be seen that under the by-laws, the president had power to "buy and sell," subject to the approval of the finance committee, which was to consist of himself and two other of the trustees. There were but two other members of the board of trustees, and the testimony shows that he consulted them in making the deed in question, but as stated, the evidence clearly shows that it was the practice for the president to run the corporation to suit himself; he was practically the corporation, being the owner of all the stock, excepting the few shares his wife and son owned.

Also, the testimony shows, and is undisputed, that the deed delivered at the bank was executed under the corporate seal of the corporation, and we think there is no exception to the rule that this implies that the execution was by authority of the corporation. Thus, it is stated in Devlin on Deeds, sec. 341, speaking of the effect of a corporate seal attached to a deed:

"The deed is prima facie evidence that it was affixed by proper authority." McCracken vs. City of San Francisco, 16 Cal. 591.

In the absence of proof to the contrary therefore, the corporation seal being affixed, creates the presumption that the execution of the deed had the approval of the finance committee. As we have stated, however, the testimony of Hewitt shows that he did consult both his son and wife, who were the other two members of the finance committee.

As we understand the law relative to private corporations, the by-law above quoted was ample authority for the president to execute deeds, and it required no additional authority or action on the part of the board of trustees to empower him so to do.

In PEEK VS. SKEELEY LUMBER CO., 59 Ore. 37 (117 Pac. 413) the Supreme Court of Oregon held that the following provision in a by-law was sufficient authority for a president to sign negotiable paper of a corporation, towit:

> "The president shall be general executive officer of the corporation * * * shall sign all stock certificates, written contracts, deeds, checks or warrants upon the treasurer, and shall perform generally all the duties usually appertaining to the office of president of a corporation. He shall have general charge, (subject to the control of the board of directors) of the business affairs of the corporation, may sign and indorse bonds, bills, checks and promissory notes on behalf of the corporation, but

shall have no power to incur any debt on behalf of the corporation, without the previous consent of the board of directors."

Passing on the sufficiency of the authority here given, the court said on page 414:

"We think the by-law quoted is not of doubtful meaning, and disposes of the case against defendant's contention. In the by-law quoted the words in brackets—'subject to the control of the directors' means that they may control his acts even in the matters expressly delegated to him, but, unless they do take some action, the acts authorized may be done by him without other authority from the board. That language is a reservation in the board of a right to control his acts but the authority is complete in the matters enumerated until the board has affirmatively directed otherwise."

As stated in the foregoing opinion, and the same applies equally to the by-law in question, "the language is a reservation in the board of a right to control his acts, but the authority is complete in the matters enumerated until the board has affirmatively directed otherwise," so here, the authority was complete in the president until the finance committee directed otherwise, but we do not think it necessary to appeal to this authority because we think the clear inference from the testimony was and is that the president by custom, acted without other authority than the by-laws, and it was his universal practice with the knowledge of the other members of the board, to execute deeds and bind the corporation.

There is another ground upon which the validity of the deed may well be rested, namely, the fact that Henry Hewitt, Jr., was practically the owner of the corporation. In *Baines* vs. *Coos Bay Navigation Co.*, 45 Ore. 307, at page 313, it is said:

> "Where, however, the general manager of a corporation is practically the owner of all its capital stock, self interest must necessarily prompt him to protect the rights of his principal in approving claims against it, in which case no valid reason can well be assigned why power to issue negotiable instruments to evidence debts incurred in the legitimate prosecution of the business of the corporation should not be implied."

XII.

AS TO DEFENDANT'S CONTENTION THAT MATERIAL LETTERS ARE OMITTED OR DO NOT APPEAR IN EVIDENCE.

The defendant makes the further contention that certain letters necessary to a full understanding of the transaction do not appear in the evidence and counsel cite Section 2104, of Wigmore on Evidence, which states that: "Where a writing offered refers to another writing, the latter should also be brought in at the same time provided the reference is such as to make it probable that the latter is requisite to a full understanding of the effect of the former." They then refer to the letter of January 3d, written by Ferguson to Hewitt, in which Ferguson says:

"This morning I wrote to the Hewitt Investment Co. which letter you will undoubtedly receive about the same time that you receive this, and at noon today, I received your letter of the 2nd, to which I hasten to reply. I think, in order to get this matter straightened out with the greatest possible speed, it would be best for you to prepare a new deed making it just the same as the former deed excepting to state that the land is all in T. 6 N. R. 6 W., W. M. instead of T. 6 S. as it now reads. It is evident from the deed in the bank that you have a copy and can see how this mistake occured. This deed you can send to the bank to be substituted for the one that is now in their hands."

In the first place, it does not appear that the letter which Ferguson received was necessary to a full understanding of his letter. His letter clearly referred to the deed that was in the bank and pointed out the error it contained, and suggested what should be done to correct the error. It is inconceivable that anything contained in the letter received from Hewitt would shed any light on or give any clearer understanding of the Ferguson letter than is given by its own language. According to the authority quoted, the letter referred to is only necessary when it is requisite "to a full understanding of the effect of the former." If, however, defendant considered at the time of the trial that the letter referred to was necessary or desirable, it should have demanded the production thereof. It did not do so. This is the first time that it has raised any question relative thereto. Furthermore, in this date and age of the world, business

men have copies of all letters they write, and no doubt the defendant had a copy of the Hewitt letter. Mr. Ferguson introduced all the letters he had, and if the defendant desired to substitute secondary evidence, or a copy of the original letter of "the 2nd" from Hewitt to Ferguson, it should have applied for that privilege at the trial.

The defendants next object to the consideration of the letter of January 25, 1906, because, they say, it refers to another letter written by Hewitt. This objection appears on page 38 of defendant's brief, and a portion of the letter of January 25th is quoted, and Ferguson is there quoted as saying:

"Your recent letter received; it has no date but it was probably written January 13th as the letter to the bank, to which they have called my attention, is dated the 13th."

Now this letter of January 25th, which counsel object to having considered was introduced by defendant, as will appear at page 84 of the Transcript of record. It is rather a novel proceeding for a party to introduce in evidence a letter and then thereafter object to its consideration, because it refers to another letter which has not been produced. We think it hardly necessary to spend much time discussing this proposition.

XIII.

DEFENDANT FURTHER CONTENDS THAT THE EVIDENCE FAILS TO SHOW A MEETING OF THE MINDS OF THE PARTIES UPON THE TERMS AND CONDITIONS OF THE CONTRACTS.

We think our previous discussion of the evidence has been sufficient to demonstrate the error of this contention, and we will not devote much more time to that phase of the case. The writings show that on July 24, 1905, Ferguson wrote to the defendant calling attention to the fact that in a personal interview with its Mr. Hewitt some time prior thereto, they had discussed the matter of the sale to Ferguson of the "4 claims that you own in 6/6." He states that the price then named was more than his parties were disposed to pay, but it had occured to him that the defendant might be willing to trade the lands for certain other lands. This letter, directed to the defendant was answered by Henry Hewitt, Jr., the president, by endorsing the following thereon, and returning it to Ferguson:

> "Yours received on my return. I hardly care to trade lands. I might sell the whole bunch at 20.00 per acre. It is heavily timbered, which average from 6 to 9 M. per claim. One claim somewhat burnt."

The testimony shows that the words and figures "from 6 to 9 M. per claim" mean from 6 millions to 9 millions of feet per claim. To this letter Ferguson replied, under date of September 25, 1905, addressing his letter to the defendant, Hewitt Investment Company, (see page 130 of Transcript), in which he stated that he had received defendant's letter proposing to sell the 4 claims at $20.00 per acre, but was not satisfied with the price, and then stated: "I am authorized to offer you $8000.00 for the 4 claims in 6/6."

Thereafter, it seems the parties had oral communications and conversations, and these were followed by two letters from Henry Hewitt, one to the Astoria National Bank, stating: "Please deliver the enclosed deed of lands in 6/6 West to E. Z. Ferguson, $12,800.00 net to us in Tacoma funds. We have notified Mr. Ferguson and he will probably call for the deed at an early date."

The letter to Ferguson of the same date was as follows:

"We have today sent deeds for lands to Astoria Nat. Bk. which they will deliver to you on payment of $12,800.00."

On January 3rd, Ferguson paid the $12,800.00 into the bank, and on the same date, wrote the defendant, calling attention to the fact that in the deed sent to the bank, "the description reads T. 6 S. instead of T. 6 N." and stating: "I have today deposited in the Astoria National Bank the sum of $12,800.00, the sum to be sent to you in Tacoma Exchange when the title to this land is made perfect in me. I do this so that you will understand that I am not endeavoring to gain time, but am ready and willing to take over the deal whenever it is in shape for delivery. * * * In regard to the commission of 2½%, as mentioned in your letter, I think it was thoroughly understood between myself and My Henry Hewitt that I was to have the 5% and I think of course that I should have it, but if the Company absolutely refuses to allow me more than 2½%, *I will, of course, take the lands anyway.*"

On the same date, he wrote to the President of the defendant, Henry Hewitt, saying:

> "This morning I wrote to the Hewitt Investment Co. which letter you will undoubtedly receive about the same time as you receive this, and at noon today, I received your letter of the 2nd, to which I hasten to reply. I think, in order to get this matter straightened up with the greatest possible speed, it would be best for you to prepare a new deed making it just the same as the former deed, excepting to state that the land is all in T. 6 N. R. 6 W. W. M. instead of T. 6 S. as it now reads.
>
> It is evident from the deed in the bank that you have a copy and can see how this mistake occured. This deed you can send to the bank to be substituted for the one that is now in their hands."

Further on in the letter, Ferguson discussed the matter of the commission, reference to which is made in several letters, saying:

> "In regard to the commission of 2½% instead of 5% as you agreed, I hardly think that you should cut me off from this, as it was thoroughly understood between us, and I believe that after you have considered the matter fully, that you will persuade the company to allow it. *However, in any event, we want the land whether the company will allow us 5% or not.*"

On January 5, 1906, Henry Hewitt, President of the defendant, wrote Ferguson in answer to his suggestion

in the letter above quoted that they correct the deed, as follows:

> "Your favor Jan. 3 received. I have written Astoria Nat. Bank to return deeds and as you suggest will make out new deeds, Mr. Griggs has the old Hattie Lockwood deeds signed by him as power of attorney and will send new deed for her to sign. It may take some little time. * * * Advise bank to return deeds."

On the same date, the Hewitt Investment Company wrote to the Astoria National Bank, saying:

> "The Hewitt Investment Co. or Henry Hewitt, sent you some time ago deeds to deliver to E. Z. Ferguson on payment of $12,800.00, I think. The deeds it seems are faulty & Mr. Ferguson wants them changed. You will please return them and oblige."

On January 8, 1906, Ferguson wrote to Hewitt saying:

> "Replying to your favor of the 5th, I have to say that the bank has informed me that they would return the deeds to you by tonight's mail. I suppose it will take two or three weeks for you to get them straightened out. In any event, the money will be left at the bank for you as soon as the title is completed."

On January 9, 1906, the Astoria National Bank wrote to the Hewitt Investment Company, saying:

> "Replying to yours of Dec. 22, 1905, we hereby return for correction the deed mentioned therein

at the request of Mr. E. Z. Ferguson, grantee named in said deed. We beg to state that on the 3rd inst. Mr. Ferguson deposited in this bank the sum of $12,800.00, to be paid to you in Tacoma Exchange, and the title to the property purporting to be conveyed in said deed to be perfect in him, and we hold the same subject to the above conditions."

The record shows that plaintiffs called on the defendant to produce the deed, which was returned to it by the bank, but Henry Hewitt, the president, and J. J. Hewitt, the secretary of the defendant corporation, both testified that it had been destroyed or lost; that they could not find it. That it has been either destroyed or lost we seriously doubt, but nevertheless the defendant refused to produce it. In this connection, it is interesting to observe that Mr. Ferguson testified that from an inspection of the deed, which was sent to the bank, both he and his attorney remarked at the time that a press copy thereof had been taken, and in the letter of Mr. Ferguson, of January 3rd, to Henry Hewitt, at page 66 of the Transcript, he refers to the deed, saying: "It is evident from the deed in the bank that you have a copy and can see how this mistake occurred," but the copy was never produced, nor was the fact that they had a copy ever denied, either in the correspondence, or otherwise. Mr. Ferguson, however, testified regarding the contents of the deed. He stated, in substance, its language and the description of the property, the same being as described in the complaint herein, excepting that the land was described as being in Township 6

south instead of Township 6 north. He testified that it was a regular warranty deed and was duly acknowledged, and was executed under the corporate seal of the corporation, was signed in the name of the corporation by the president and secretary.

We have then here a correspondence, which in connection with the deed, gives a true and correct description of the land to be sold, gives the purchase price to be paid, the parties, grantor and grantee, and in fact, all of the terms of the contract certainly sufficient to constitute the memorandum required by the statute. It may be said that the description in the deed was faulty. In one respect that is true, but the letters point out wherein the description was faulty and what was necessary to make the description correct. Whatever may be said of any case holding that a deed deposited in escrow, or in the hands of a third party may not be considered for the purpose of aiding the writings or supplying the description, the doctrine thereof cannot apply in this case because here the correspondence so distinctly refers to the deed that it makes it a part thereof. We submit, therefore, that a sufficient memorandum of the contract is in writing and that it clearly appears therefrom that the defendant agreed to sell and the plaintiff agreed to purchase the premises in question for the sum of $12,800.00.

In what respect then did the minds of the parties fail to meet? The written evidence shows that the agreement was that the defendant would sell and the plaintiff would purchase the premises for $12,800.00; it shows,

as well, a true description of the premises to be sold. It is contended by counsel for defendant, however, that a condition of the sale was that Ferguson should secure for the defendant certain other lands. That phase of the case we have considered under another heading, and we think that we have demonstrated that there was no such condition. The talk about that was entirely aside from the contract of sale.

It is also contended that the minds of the parties did not meet in this, that Ferguson contended in his letter to the bank that the title in him was to be made perfect. That, as we have shown, was a condition of the escrow. Ferguson testifies positively and directly that it was agreed that the deed should be sent to the bank, and after being examined by him, and the title inspected, if found to be perfect, he was to pay the money and take the deed, and he was to have the necessary time to make the examination. The correspondence shows, as we have hereinbefore pointed out, that the defendant did not question at any time but what it was to give a perfect title, and made no objections to the suggestions on the part of Ferguson looking to making the title perfect.

Also, at page 44, and elsewhere in their brief, they assert that Ferguson demanded not only a perfect, but "a merchantable title." There is no such testimony that we can recall, or that we have been able to discover. Ferguson did write to the bank that the money was to be paid to the defendant as soon as the title was perfect in him, and that, as we have shown, was a part of the escrow agreement proven by uncontradictory testimony.

XIV.

AS TO DEFENDANT'S CONTENTION THAT THE DEED WAS NOT DEPOSITED IN THE BANK AS AN ESCROW.

We have already attempted to show that the deposit of the deed in the bank was a deposit in escrow. We wish briefly, however, to refer to some of the authorities cited by defendant in support of its contention that the deposit was not made as an escrow.

The first case cited is that of Van Valkenburg vs. Allen, 126 N. W. 1092. It is there stated that the case did not involve an escrow in the technical sense because "there was no delivery to a custodian *in pursuance of an agreement of the parties.* * * * The bank was not a party to the agreement and was in no wise agreed upon by the parties as a custodian. It was merely Allen's agent. Its possession was Allen's possession. The deed it received was under Allen's control and dominion."

Now, the facts in the case at bar present an entirely different situation. Here, the deed was sent to the Astora bank pursuant to an agreement between the parties. That is testified to positively, as we have shown, by Ferguson, and his testimony in that respect is not disputed by any witness and, as we have pointed out, is corroborated by the written correspondence. The bank was not in this case the defendant's agent. It will be remembered that we have heretofore pointed out that in the letter of Hewitt to Ferguson stating that he had written to the bank in compliance with Ferguson's request to have the bank return the deed in order that it

might be corrected and asked Ferguson to advise the bank to return the deed. Ferguson then wrote to the defendant that he had advised the bank to return the deed. The defendant wrote to the bank and requested it to return the deed. The bank then wrote to the defendant, that complying with its request and at the request of Mr. Ferguson, it forwarded to it the deed for correction. This all shows quite clearly, we think, that the bank was not the agent of the defendant, but that it held the deed in escrow, pursuant to the agreement of the parties.

The case of DAVIS VS. BRIGHAM, 56 Ore. 41, is also cited by defendant, but we respectfully submit it does not support its contention. In that case, one Mitchell was endeavoring to get together a large body of land and sell it to one, Davis. Brigham owned one claim in the neighborhood of the lands Mitchell was seeking to syndicate, and Mitchell wrote to Brigham urging him to put his land in for $1600.00. Brigham answered that he considered $1600.00 too small a price, but that if his land was needed in order to develop the country, he would let it go at that price, and he sent a deed to the bank, with a draft attached, the deed being made out to Davis, the man to whom Mitchell was seeking to sell the lands. Davis declined to honor the draft and Brigham therefore instructed the bank to return the deed. There had been no negotiations whatever between Davis and Brigham. It was solely on the ground that there had been no agreement between them for the sale and purchase of the land and no acceptance of the offer of Brigham by Davis that the court held specific perform-

ance could not be enforced. The deed was not sent to the bank through any agreement, or pursuant to any arrangement between the parties, and no money was paid into the bank by either Davis or Mtichell, but on the contrary, Davis declined to honor the draft. The court quite properly said, as quoted in defendant's brief, "It (the deed) was not a deposit upon a contract with him (Davis) that it should be deposited, nor had he a right to demand that it remain in escrow for his benefit or for any period of time." Quite true. There had been no agreement that the deed should be sent to the bank or deposited with the bank, and indeed, there had been no agreement whatever with Davis. The man, Mitchell, who was collecting the lands, or trying to secure a body of land in order that he might sell it to Davis, had the correspondence, such as there was, with Brigham. Here, there was an agreement that the deed should be sent to the bank and both parties recognized that it took the assent of each of them to have it withdrawn from the bank even for correction.

We have shown that here there were sufficient parties, and that they entered into a contract, and hence, the plaintiff's case comes clearly and fully within the rule announced by the court. Counsel quote from Devlin on Deeds to the effect that; "Where the grantor retains the right of control over the deed, it is not an escrow, notwithstanding it may have been deposited with a third person with instructions to deliver it to the grantee upon the compliance with said specified conditions."

But, how does that apply to this case? Here, as we

have seen, the grantor did not retain the right of control and recognized that it did not contain the right of control, because after the parties had agreed that the deed should be withdrawn for correction, the defendant wrote both the bank and Ferguson to have the deed returned; wrote to the bank to return it and requested Mr. Ferguson to advise the bank so to do; recognized the right of Ferguson to have the deed retained, and recognized the fact that it was not within the control of the defendant. We think it is not necessary to further discuss the authorities cited by defendant on this proposition.

XV.

THE PAYMENT AND TENDER OF THE MONEY.

It is contended by the defendant at page 53 of its brief that Ferguson did not make an unconditional tender of the $12,800.00. In support of their contention they state that he deposited the money in the bank to be paid to the defendant when the title should be made perfect in him, Ferguson. We have several times pointed out that the testimony is undisputed that such was the condition of the escrow, but at page 54 of their brief, counsel state that Ferguson testified, "I considered the money was there subject to my order and I had a right to withdraw it without obtaining any consent of Mr. Hewitt." We submit that this is a very unfair statement of the testimony, for reference to the record will show that Mr. Ferguson was testifying about the withdrawal of the money from the bank at the time this

suit was commenced in order to pay it into court. Of course, the testimony as shown in the record, is a condensed statement, and does not as fully disclose the testimony as it was given at the trial, but even from this condensed statement, the fact, as we have stated it, quite clearly appears. Mr. Ferguson testified on direct examination that the money remained in the bank as a tender. This was never withdrawn until this suit was commenced. He was then asked on re-cross examination whether he obtained the consent of defendant to withdraw the money from the bank. He answered, "At the time I withdrew the money from the bank, I did not ask or obtain any consent of Mr. Hewitt to such withdrawal. I considered the money was there subject to my order, and I had a right to withdraw it without obtaining any consent from Mr. Hewitt. That was after he had refused to send the deed back and when I had to bring suit to get the deed." And quite clearly he was right.

The record shows that as late as April 30, 1906, the Astoria Bank wrote to the Hewitt Investment Co. calling its attention to the fact that the $12,800.00 was still on deposit with it, and concluded by saying: "Will you kindly let us know whether or not there is any probability of the trade being closed and kindly state whether or not you desire us to hold the money any longer." There was no answer to that letter. This letter of the Astoria Bank was introduced by the defendant (see page 83, transcript), and yet counsel seek to make it appear that Ferguson's testimony was that the money was on deposit subject to his order. Of course, he gave no such

testimony and the testimony he gave is not subject to any such construction.

XVI.

AS TO DEFENDANT'S CONTENTION THAT TO DECREE SPECIFIC PERFORMANCE WOULD BE INEQUITABLE.

Defendant seeks to make it appear that it would be inequitable to decree specific performance because it appears from the evidence that the land has advanced greatly in value. That contention is based on the testimony of Mr. Ferguson, who at the trial testified that at the time the land was purchased, the price to be paid was a higher price than any land in that locality had sold for theretofore. His testimony appears on page 124 of the transcript. He states that nearly all the land which they had purchased in that vicinity had been purchased for less than $12.50 per acre, and some as low as $1000.00 per claim, within a few months preceding the time of entering into the contract with the defendant. He further testified as follows:

> "I know timber through the Nehalem valley was rated along those lines at that time, but it raised after that quite rapidly and was raising all the time in 1906 and 1907. Timber went up very rapid during 1906. I bought and sold a great deal of timber in that vicinity. * * * Timber went up very rapidly after this deal was made, but at the time we purchased this land, $20 an acre was an extra high price for it."

Doubtless the fact that subsequent to the contract,

the price of such lands advanced explains why the defendant repudiated its contract, but does it offer any reason why this court should not enforce the contract, if it finds it was made as plaintiffs contend? At the time this contract was made, a good round price was paid, according to the then value of the land. If the land had decreased in value and the defendant had returned the deed and demanded its money, would it not have been entitled to recover? Would the fact that the land had decreased in value be a defense for the plaintiffs in the action against them to recover the purchase price?

Counsel state that nearly a year expired after the defendant refused to deliver the deed before suit was brought to compel the performance, and that in the meantime, the land increased in value, but it should be kept in mind that *during all that time the* $12,800.00 *remained on deposit and was tendered to the defendant,* and we are at a loss to understand how any injustice would be done the defendant at this time by requiring it to conform to and comply with its contract.

This case was heard and tried in the court below by Judge Wolverton, who heard the witnesses testify, saw their demeanor on the witness stand, and who carefully inquired into all of the facts. His decision appears at page 21 of the transcript, and we have no doubt it will be carefully read by each member of this court. We really need not have discussed the case further than to submit the opinion of Judge Wolverton, because it is a fair and clear statement of the facts and the law. We respectfully submit that the decree of the Lower Court should be affirmed.

FULTON & BOWERMAN,
Attorneys for Appellants.

No. 2275

United States

Circuit Court of Appeals

For the Ninth Circuit

PACIFIC COAST COAL COMPANY,
Plaintiff in Error,

vs.

STANLEY BROWN,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

No. 2275

United States

Circuit Court of Appeals

For the Ninth Circuit.

PACIFIC COAST COAL COMPANY,
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vs.

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Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

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TESTIMONY ON BEHALF OF DEFENDANT—CONTINUED:

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No. 77048.
No. 1978.

STANLEY BROWN,

Plaintiff,

vs.

PACIFIC COAST COAL COMPANY,

Defendant.

Transcript on Removal from the Superior Court of the State of Washington in and for the County of King to the United States Circuit Court for the Western District of Washington, Northern Division.

[Endorsed]: Filed U. S. Circuit Court, Western District of Washington, May 1 1911. Sam'l D. Bridges, Clerk. R. M. Hopkins, Deputy.

In the Superior Court of the State of Washington for King County.

No. 77048.

STANLEY BROWN,

Plaintiff,

vs.

PACIFIC COAST COAL COMPANY,

Defendant.

PETITION FOR REMOVAL.

To the Honorable the Judges of the Superior Court of the State of Washington for King County:—

The petition of the Pacific Coast Coal Company, organized under the laws of the State of New York, respectfully shows:

That the above entitled cause is a suit at common law of a civil nature, wherein the matter in dispute now exceeds, and at the time of the commencement of this suit exceeded, the sum of two thousand dollars ($2000.00), and that this suit, and the entire controversy therein, is between the above named plaintiff on the one side, who at the time of the commencement of this action was, ever since has been, and now is, a citizen of the United States, a citizen and resident of the State of Washington, and a resident of King County therein, and within the jurisdiction of this court; and your petitioner, Pacific Coast Coal Company, the above named defendant, on the other side, which company was, at the time of the commencement of the above entitled cause, ever since has been and now is, a corporation created and existing under and by virtue of the laws of the State of New York, and your petitioner is not now, was not at the commencement of this action, and never has been at any time whatsoever, a citizen or resident of the State of Washington, but is now and at all times has been a citizen and resident of the State of New York, licensed to do business in the State of Washington, and having a duly authorized agent in the last mentioned state.

Your petitioner desires to remove this suit from the Superior Court of the State of Washington, into the United States Circuit Court, for the Western District of Washington, Northern Division.

Your petitioner offers and files herewith a bond, with good and sufficient surety, for its entering into the Circuit Court of the United States for

the Western District of Washington, Northern Division, on the first day of its next session a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court if said court should hold that this suit was wrongfully or improperly removed thereto.

Your petitioner further prays that said surety and bond may be accepted, that this suit may be removed to the next Circuit Court of the United States to be held in and for the Western District of Washington, Northern Division, pursuant to the statutes of the United States in such case made and provided, and that no further proceedings may be had therein in this court.

PACIFIC COAST COAL COMPANY

By J. W. SMITH, Its Secretary.

FARRELL, KANE & STRATTON,

Attorneys for Petitioner.

State of Washington,
County of King.—ss.

J. W. Smith, being first duly sworn on his oath, deposes and says: I am secretary of the Pacific Coast Coal Company, the corporation defendant above named, and as such secretary make this verification for and on behalf of said defendant corporation. I have read the foregoing petition, know the contents thereof, and the same is true.

J. W. SMITH.

Subscribed and sworn to before me this 12th day of November, 1910.

PETER PRATT,
Notary Public in and for the State of Washington, residing at Seattle.

Filed November 14, 1910.

D. K. SICKELS, Clerk.

In the Superior Court of the State of Washington For King County.

No. .....

STANLEY BROWN,

Plaintiff.

vs.

PACIFIC COAST COAL COMPANY, a corporation,

Defendant.

BOND ON REMOVAL.

KNOW ALL MEN BY THESE PRESENTS, That we, Pacific Coast Coal Company, a corporation organized and existing under and by virtue of the laws of the State of New York, as principal, and J. W. Smith, as sureties, stand held and firmly bound unto Stanley Brown, the above named plaintiff, in the penal sum of five hundred dollars ($500.00) for the payment of which, well and truly to be made, to the said Stanley Brown, we do hereby bind ourselves, our successors, heirs, administrators and executors, jointly and severally, firmly by these presents.

Sealed with our seals and date at Seattle, Washington, this 10th day of November, 1910.

Whereas the above named Pacific Coast Coal Company filed its petition in the Superior Court of the State of Washington for King County, for the removal of a certain case therein pending, wherein Stanley Brown is plaintiff and the above named Pacific Coast Coal Company is defendant, to the Circuit Court of the United States for the Western District of Washington, Northern Division.

Now the condition of this obligation is such, that if said Pacific Coast Coal Company shall enter in the Circuit Court of the United States for the Western District of Washington, Northern Division, on the first day of its next session, a copy of the record of this suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and effect.

In witness whereof the said Pacific Coast Coal Company and the said J. W. Smith have hereunto set their hands and seals this 10th day of November, 1910.

PACIFIC COAST COAL COMPANY,

By C. E. HOUSTON, Its Manager.

J. W. SMITH. (Seal)

(Seal)

Signed, sealed and delivered in presence of Peter Pratt.

State of Washington,
County of King.—ss.

..... J. W. Smith, being first duly sworn, each for himself and not one for the other, on oath deposes and says: I am a citizen of the State of Washington, over the age of twenty-one years; I am worth the sum of five hundred dollars ($500.00) over and above all my just debts and liabilities in property within the State of Washington, exclusive of property exempt from execution.

Subscribed and sworn to before me this 12th day of November, 1910.

PETER PRATT,
Notary Public in and for the State of Washington, residing at Seattle.

This foregoing bond and the surety thereon is this 14th day of November, 1910, taken and approved by the undersigned.

BOYD J. TALLMAN,
Judge of the Superior Court of the State of Washington for King County.

Filed November 14, 1910. D. K. Sickels, Clerk.

In the Superior Court of the State of Washington For King County.

No. .....

STANLEY BROWN,

Plaintiff,

vs.

PACIFIC COAST COAL COMPANY, a corporation,

Defendant.

ORDER OF REMOVAL.

Pacific Coast Coal Company, defendant above named, having filed its petition to remove this cause to the Circuit Court of the United States, for the Western District of Washington, Northern Division, and having filed with said petition its bond, conditioned according to law, which bond has been approved by the Court, and said petition and bond having been filed within the time limited by law;

It is by the Court ordered that this cause be and the same is hereby removed to the Circuit Court of the United States for the Western District of Washington, Northern Division, and that all further proceedings in this court be and the same hereby are stayed.

Done in open court this 14th day of November, 1910.

BOYD J. TALLMAN, Judge.

Filed November 14, 1910. D. K. Sickels, Clerk.

In the United States District Court of the Western District of Washington, Northern Division.

No. 1978.

STANLEY BROWN,

Plaintiff,

vs.

THE PACIFIC COAST COAL CO.,

Defendant.

AMENDED COMPLAINT.

For cause of action against the defendant above named the plaintiff above named alleges.

I.

That at all times mentioned herein the defendant was a corporation duly existing under and by virtue of the laws of the State of New York, doing business in the State of Washington, and was the owner and operator of the Pacific Coast Coal Company's mine situated at Black Diamond, King County, Washington. That the principal place of business of said corporation within the State of Washington is at Seattle, King County, Washington.

II.

That the plaintiff is a coal miner by occupation, and prior to the date of the injury complained of herein, was able to earn about $5.50 per day working at his said occupation. That at the time of the injury herein complained of, the plaintiff was in the employ of the defendant company, as a coal miner at the defendants mine at Black Diamond, King County, Washington, and it then and there became and was the duty of the defendant to furnish a good, safe and secure place in which plaintiff could work, and to so ventilate the said mines that there could be no accumulation of combustible or explosive gases in said mines, and to use all due and reasonable care and caution in ascertaining the presence of any combustible or explosive gases in said mines, so that the plaintiff need not be needlessly exposed to the dangers thereof.

III.

That the defendant conducted itself so carelessly, negligently and wrongfully that by and through

the carelessness, negligence and default of the said defendant, its officers, agents, servants, and employees, it failed to provide a safe and secure place in which to work, which facts were known to the defendant or could have been known by the exercise of reasonable care and diligence, and were unknown to the plaintiff.

IV.

That for want of due care and attention to its duty toward the plaintiff, on or about the 17th day of September, 1910, the defendant caused Ignato Rigga, or a person of similar name, whose exact name is to complainant unknown, being then and there in the employ of the defendant as a gas tester and fire boss, and acting in due course of his employment, to ignite a fuse with the intent of blasting in said mine, in the due course of his employment as gas tester and fire boss, and at said time there was an accumulation of combustible and explosive gases in said mine, and by reason of the accumulation of said gases and by reason of the negligence, carelessness, and default of the defendant in improperly ventilating said mines, and in failing to ascertain the presence of said gases, the said gases were negligently and carelessly lighted by the said person designated as Ignato Rigga, while he was igniting the said fuse, and the gases in said mine burned and exploded and injured the plaintiff, whilst the plaintiff was in the employ of the defendant in the capacity aforesaid, and as a result of said combustion and explosion the plaintiff was greatly burned and wounded about his head,

arms, and side, and had a rib broken upon his left side, as a result of a fall caused by said explosion, and he became sick, sore, and disordered, and suffered great pain and mental anguish, and has been totally incapacitated from work, and will remain so for some time to come, and has been compelled to expend moneys for medical attendance, and was prevented from attending to his business, and lost all his wages he otherwise would have earned, to-wit: about the sum of $175.00, all to the damage of the plaintiff in the sum of $4,675.

Wherefore, plaintiff demands judgment against the defendant the Pacific Coast Coal Company, a corporation in the sum of $4,675.00 together with his legal costs and disbursements herein.

H. R. LEA,
Attorney for Plaintiff.

State of Washington,
County of Pierce.—ss.

Stanley Brown, being first duly sworn on oath, deposes and says, that he is the person named in the foregoing complaint, that he has read the same, knows the contents thereof and believes the same to be true. STANLEY BROWN,

Subscribed and sworn to before me this 20th day of May, 1912.

[Seal] H. R. LEA,
Notary Public in and for the State of Washington, residing at Tacoma.

[Endorsed]: Amended Complaint. Filed in the U. S. District Court, Western Dist. of Washington May 20, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States, Western District of Washington, Northern Division.

No. 1978.

STANLEY BROWN,

Plaintiff,

vs.

PACIFIC COAST COAL COMPANY,

Defendant.

ANSWER TO AMENDED COMPLAINT.

Comes now the defendant herein, and for answer to plaintiff's amended complaint in this cause, alleges as follows:

I.

Referring to paragraph 2 of said amended complaint, this defendant denies each and every allegation therein contained.

II.

Referring to paragraph 3 of said amended complaint, this defendant denies each and every allegation therein contained.

III.

Referring to paragraph 4 of said amended complaint, this defendant denies each and every allegation therein contained.

And for a further and first affirmative defense to plaintiff's said amended complaint, this defendant alleges that the accident, if any, referred to therein, was due wholly or in part to plaintiff's own negligence.

And for a second affirmative defense to plaintiff's said amended complaint, this defendant alleges that the accident, if any, referred to therein,

was due wholly or in part to the negligence of a fellow servant or servants in the course of their employment.

And for a third affirmative defense to plaintiff's said amended complaint, this defendant alleges that the accident, if any, referred to therein, was due to causes, the risks and hazards of which were well known to said plaintiff, and which were assumed by him upon entering into said employment.

Wherefore, this defendant prays that it go hence dismissed with its costs and disbursements herein incurred and to be taxed.

FARRELL, KANE & STRATTON,
Attorneys for Defendant.

State of Washington,
County of King.—ss.

J. W. SMITH, being first duly sworn, on oath deposes and says: that he is the secretary of the Pacific Coast Coal Company, a corporation, the defendant herein; that he has read the above and foregoing answer to amended complaint, knows the contents thereof, and believes the same to be true.

J. W. SMITH.

Subscribed and sworn to before me this 23rd day of May, 1912.

J. H. KANE,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Answer to Amended Complaint. Filed in the U. S. District Court, Western Dist. of Washington, May 24, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 1978.

STANLEY BROWN,

Plaintiff,

vs.

PACIFIC COAST COAL COMPANY,

Defendant.

REPLY.

Comes now the plaintiff herein by his attorney H. R. Lea, and in reply to the answer of the defendant:

1. Denies each and every allegation of the first affirmative defense to the plaintiff's complaint.

II. Denies each and every allegation of the second affirmative defense to the plaintiff's complaint.

III. Denies each and every allegation of the third affirmative defense to the plaintiff's complaint.

H. R. LEA,

Attorney for Plaintiff.

State of Washington,
County of Pierce.—ss.

Stanley Brown being first duly sworn on oath deposes and says that he is the plaintiff above named, that he has read the foregoing reply, knows

the contents thereof and believes the same to be true.

STANLEY BROWN,

Subscribed and sworn to before me this 11th day of May, 1911.

H. R. LEA,

Notary Public in and for the State of Washington, residing at Tacoma.

[Endorsed]: Reply. Filed in the United States District Court, Western Dist. of Washington, April 16, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington.

No. 1978.

STANLEY BROWN,

Plaintiff,

vs.

PACIFIC COAST COAL CO.,

Defendant.

VERDICT.

We, the jury in the above entitled cause, find for the Plaintiff and assess his damages at $4,000.00.

WILLIAM DUNLAP,
Foreman.

[Indorsed]: Verdict. Filed in the U. S. District Court, Western District of Washington, May 29, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States, Western District of Washington, Northern Division.

No. 1978

STANLEY BROWN,

Plaintiff,

vs.

THE PACIFIC COAST COAL CO., a corporation,

Defendant.

JUDGMENT.

The above cause having come on regularly for trial before the above entitled court upon the 24th day of May, 1912, the plaintiff appearing in person and by his attorney, H. R. Lea, and the defendant appearing by its attorneys, Farrell, Kane & Stratton, and a jury having been regularly called, impaneled, and sworn to hear said cause, and both the plaintiff and the defendant having submitted evidence, and the Court and jury having heard such evidence, and the jury having arrived at a verdict which has been received and entered, and the Court being satisfied, in accordance with said verdict:—

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the plaintiff, Stanley Brown, have and he is hereby given judgment against the defendant, the Pacific Coast Coal Company, a corporation, in the sum of $4,000, together with interest thereon at the legal rate from the 29th day of May, 1912, together with his legal costs and disbursements herein. Defendant excepts hereto and exception is hereby allowed.

Done in open court this 24th day of Feby., 1912.

CLINTON W. HOWARD,

Judge.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Feb. 24, 1913. Frank L. Crosby, Clerk. By Ed. M. L., Deputy.

O. K. as to form: F. K. & S.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1978.

STANLEY BROWN,

Plaintiff,

vs.

PACIFIC COAST COAL COMPANY,

Defendant.

PETITION FOR A NEW TRIAL.

Comes now the defendant, the Pacific Coast Coal Company, and moves and petitions this Honorable Court for a new trial of the above entitled action, and as grounds why the Petition should be granted this petitioner assigns the following causes materially affecting its substantial rights:

I.

Insufficiency of the evidence to justify the verdict in the following particulars:

1. In the opening statement of counsel it was admitted and from the evidence of the plaintiff's witnesses it affirmatively appeared and by defendant's proof it was shown that the plaintiff was fully cognizant of and realized and appreciated whatever

dangers may have been attendant upon going into and staying in the place where he alleges he was hurt and that he knew of and realized any negligence that the fire boss may have been guilty of and which may have caused any injury he may have sustained, and on account of having such knowledge and not protecting himself against such dangers and negligence, he assumed the risk of such dangers and negligence.

2. It affirmatively appears from the evidence that if the injuries of plaintiff were due to the negligence of any person it was the negligence of his fellow-servant.

3. That there was not sufficient evidence to justify the amount of the verdict returned.

II.

Newly discovered evidence material for the defendant which as shown by the affidavits of C. H. Farrell and F. Greene could not have been discovered or produced at the trial, to-wit: the evidence of R. A. Allen, M. D., John Collier, Samuel Worek, Samuel Kelleher and R. H. Moulton, as set forth in the affidavits of said parties hereto attached.

III.

Excessive damages appearing to have been given under the influence of passion or prejudice.

IV.

Irregularity in the proceedings of the adverse party by which the defendant was prevented from having a fair trial.

V.

Errors in law occurring at the trial and duly excepted to by the defendant, as follows:

1. The giving of the following instructions to the jury:

(a) There is not only the general obligation based upon the common law which is based on the general principles of right and wrong, that the employer shall observe due care for the safety of the employees, but there is in this state a positive law, a statute law which applies to coal mines.

(b) You are instructed that the duty of inspection, prevention and removal of any accumulation of gas is imposed on the Coal Company. This duty is personal and cannot be delegated, and any person who for the Company was engaged in an employment having as part of his duties the duty of inspection, prevention and removal of any accumulation of gas is not a fellow servant of a coal miner with respect to the performance of that duty.

(c) A coal company employing such person would be responsible for all damages caused by reason of negligence in the performance of his duties in the prevention, inspection and removal of any accumulation of gas.

(d) You are instructed that an employee of a coal company one of whose duties it is to test for gas in a coal mine is not a fellow servant with a coal miner so far as he is engaged in the performance of such duty.

(e) You are instructed that the law requires that the owner, agent or operator of a coal mine

must furnish not only a reasonably safe place in which to work, but also safe appliances, and this includes the timber required with which to provide and maintain a good and sufficient ventilation to carry out dangerous gases.

2. The refusal of the Court to grant the defendant's motion for a non-suit, and the refusal of the Court to grant the defendant's motion for a directed verdict.

FARRELL, KANE & STRATTON,

Attorneys for Defendant.

State of Washington,
County of King.—ss.

C. H. Farrell, being first duly sworn on oath deposes and says: That he is one of the attorneys for the defendant and petitioner in the above entitled action, namely the Pacific Coast Coal Company; that he has caused the foregoing and within petition for a new trial to be prepared, knows the contents and the purposes thereof, and believes the same are meritorious and well founded in law, and states that the same is not interposed for the purpose of delay; and that the allegations therein contained are true and correct.

C. H. FARRELL,

Subscribed and sworn to before me this 13th day of June, 1912.

(Seal) LEROY V. NEWCOMB,

Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Petition for New Trial and Affidavits. Filed in the U. S. District Court, Western Dist. of Washington, June 28, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1978.

STANLEY BROWN,

Plaintiff,

vs.

PACIFIC COAST COAL COMPANY, a corporation,

Defendant.

AFFIDAVIT OF F. GREENE IN SUPPORT OF A MOTION FOR NEW TRIAL.

State of Washington,
County of King.—ss.

F. Greene being first duly sworn on oath deposes and says: That he is the Special Agent of the Pacific Coast Coal Company, defendant in the above entitled action, and is the officer and agent of such company within whose charge and knowledge the facts of the case of Stanley Brown vs. Pacific Coast Coal Company were and are. That the evidence of R. H. Moulton, Samuel Worek, Samuel Kelleher, R. A. Allen, M. D., and John Collier is and has been newly discovered and has come to the knowledge of this affiant and to the agents of the Pacific Coast Coal Company since the

rendition of the verdict in the above entitled case; that this affiant, and the agents of the defendant company could not have procured the evidence of the aforementioned affiants at the time of the trial in the above entitled case for the reason that neither this affiant, nor any one connected with the defendant company for nearly two years subsequent to the accident referred to in the plaintiff's complaint knew of the whereabouts of Stanley Brown, or where said Stanley Brown was employed. Neither did this affiant or said company know where Stanley Brown had been employed before he worked for the Pacific Coast Coal Company at Black Diamond, as alleged in plaintiff's complaint. Consequently, this affiant or the agents of the defendant company did not know where to seek evidence regarding the said Stanley Brown. On the contrary all knowledge which this affiant or the defendant company or its agents had of the whereabouts or place of employment of said Stanley Brown, both prior to his working for the Pacific Coast Coal Company, and for nearly two years subsequent to the accident mentioned in said plaintiff's complaint, was acquired from the testimony of the plaintiff's witnesses in the trial of the above entitled case. That immediately upon learning of the plaintiff's place of employment and of his whereabouts during said time, this affiant used every effort by long distance telephone, telegraph and by personal inquiry to discover persons who could give any information pertaining to said plaintiff, or his condition or circumstances, and to secure persons who knew Stan-

ley Brown at said times, and who would testify as witnesses in the above entitled action relative thereto. This affiant, or the defendant company or its agents did not know or discover any of the persons whose affidavits accompany the Petition for a new trial herein, except Dr. Allen, until after the rendition of the verdict in the above entitled case. Neither did this affiant, or the defendant company or its agents have knowledge of any persons who could testify as to the facts contained in said affidavits until after the rendition of said verdict. This affiant was unable to locate Dr. Allen until late in the trial, and at such time was only able to have a short conversation over the long distance telephone with him. During such conversation Dr. Allen did not make known to this affiant the facts set forth in his affidavit which accompanies the Petition for a new trial herein, and the defendant or its agents had no knowledge thereof. That this affiant and the agents of the defendant company herein have used extraordinary diligence and research for the purpose of obtaining witnesses and to the discovery of facts before the trial and during the progress thereof, and the testimony set forth in the affidavits accompanying the Petition for a new trial is material and newly discovered evidence and has come to the knowledge of the defendant since the rendition of the verdict in the above entitled action.

F. GREENE,

Subscribed and sworn to before me this 13th day of June, 1912.

(Seal) LEROY V. NEWCOMB,
Notary Public in and for the State of Washington, residing at Seattle.

In t he District Court of the United States for the Western District of Washington, Northern Division.

STANLEY BROWN,

Plaintiff,

vs.

PACIFIC COAST COAL COMPANY,

Defendant.

AFFIDAVIT OF C. H. FARRELL IN SUPPORT OF A MOTION FOR A NEW TRIAL.

State of Washington,
County of King.—ss.

C. H. Farrell, being first duly sworn on oath deposes and says: That he is the attorney who prepared for trial and conducted the trial of the above entitled action. That he has read the affidavits of R. H. Moulton, Samuel Worek, Samuel Kelleher, R. A. Allen, M. D., and John Collier, which accompany the defendant's petition for a new trial and knows the contents thereof; that the facts and matters set forth therein constitute evidence in favor of the defendant in the above entitled action, which in the opinion of this affiant would wholly or materially change the verdict of a jury, and which has been newly discovered since the rendition of the verdict in said action, and which could not have

been produced at said trial by the exercise of reasonable diligence on the part of the defendant or its agents for the reason that the facts contained in said affidavits go to the proving of the condition and circumstances of Stanley Brown prior to and subsequent to the time of the accident alleged in plaintiff's complaint. And at the time of preparing this case for trial this affiant, the defendant and its agents were wholly ignorant of the whereabouts or place of employment of said Stanley Brown during said times, and consequently did not know prior to the trial of the cause, and were unable by the exercise of great diligence to ascertain where they might disscover any evidence relating to the condition and circumstances of Stanley Brown during said times, or any witnesses who would testify thereto. The first knowledge which this affiant or the agents or officers of the defendant had of the whereabouts or place of employment of Stanley Brown prior to his working for the defendant, and for nearly two years prior to the time of the trial, was obtained from the testimony of the plaintiff's witnesses during the progress of the trial. That immediately upon obtaining such information this affiant and the agents of the defendant company by means of long distance telephone, telegraph and personal investigation used every effort and exercised great diligence to discover evidence pertaining to the condition and circumstances of Stanley Brown during said time, and to find witnesses who could testify thereto but were unable to obtain such information until after the rendition of the verdict of

the jury in this cause. That all of the witnesses whose affidavits accompany the Petition for a new trial, except Dr. Allen, were only discovered after the return of the verdict of the jury, and said Dr. Allen was only located late in the trial and at such time it was impossible for the defendant's agents to have anything but a short conversation with him over the long distance telephone; and this affiant at no time had an opportunity to speak with him, and this affiant did not know that he would testify to the matters and things set forth in his affidavit accompanying the defendant's petition for a new trial, and did not discover such fact until after the rendition of the verdict herein. That the defendant, its agents and this affiant have at all times exercised great diligence to discover the evidence contained in the affidavits aforementioned, but were unable to do so in time to produce the same at the trial. That said evidence and witnesses, except Dr. Allen, have all been discovered since the rendition of the verdict of the jury herein. That this affiant verily believes that the ends of justice will be best subserved by granting a new trial, and permitting the defendant to introduce the evidence set forth in the affidavits accompanying the petition for a new trial.

C. H. FARRELL,

Subscribed and sworn to before me this 13th day of June, 1912.

(Seal) LEROY V. NEWCOMB,
Notary Public in and for the State of Washington, residing at Seattle.

State of Washington,
County of Pierce.—ss.

Samuel Kelleher being duly sworn deposes and says: "I am steward of the Hotel at Carbonado and have been so employed for the past five years. Stanley Brazzo (also known as Stanley Brown) was employed by me to work in the hotel on June 15th, 1910, and continued in said employment until August 9th, 1910. He was re-employed by me on December 9th, 1910 in the same capacity and continued at work almost continuously until February 18th, 1912. During the periods above mentioned I never knew of his having any ailment. He never mentioned to me that he had been troubled by spitting blood, and I never saw him spit blood and he was always in apparent good health, and so far as I could judge, I could not see any difference in his general appearance from the time he first entered my employ, viz: June 15th, 1910, until he left on February 18th, 1912.

I hereby certify that I will testify to the above state of facts in the event that a new trial is granted in the case of Stanley Brown vs. Pacific Coast Coal Company.

SAMUEL KELLEHER,

Subscribed and sworn to before me this 11th day of June, 1912.

(Seal) T. J. ANDERSON,

Notary Public in and for the State of Washington, residing at Wilkeson, Washington. My commission expires Oct. 6th, 1912.

State of Washington,
County of Pierce.—ss.

Samuel Worek being duly sworn deposeth and says: I am head waiter at the hotel at Carbonado and have been so employed for the past two years. I knew Stanley Brazzo (also known as Stanley Brown) who was employed to work as dishwasher, waiter, etc., in the hotel June 15th, 1910 and remained in that capacity until August 9th, 1910, and returned to work at the same employment in the hotel on December 9th, 1910 and remained almost continuously in the same employment until February 18th, 1912. During all of the above named period he was under my constant observation every day—I never saw him spit blood and he never told me that he had any ailment, but on the contrary was always in apparent good health and performed his work in a workmanlike manner. His appearance has not changed that I could notice from the time that he first came to work in June, 1910, until he left in February, 1912.

I hereby certify that I will testify to the above stated facts in the event that a new trial is granted in the case of Stanley Brown vs. Pacific Coast Coal Company.

SAM WOREK,

Subscribed and sworn to before me this 11th day of June, 1912.

(Seal) T. J. ANDERSON,

Notary Public in and for the State of Washington, residing at Wilkeson, Washington. My commission expires Oct. 6th, 1912.

State of Washington,
County of Pierce.—ss.

R. A. Allen being first duly sworn on oath deposes and says: I took care of Stanley Brazgo in May, 1910, when I was called to the house where he was boarding. I was told that he had fainted while at work in the mine. Upon examination I found him lying quiet in bed showing no signs of suffering, with a good color and with no elevation of temperature nor any increase in the rate of pulse or respiration. I made an examination of his chest by palpation, percusision and auscultation and found nothing abnormal. As I remember it his principal complaint at the time was of a pain in the left chest in the precordial region. He remained in bed for a week or more and nothing further developed aside from an elevation of temperature of one degree on the second or third day which I attributed to bowel stasis. It was with difficulty that I persuaded the patient to get out of bed. He seemed to think he was seriously sick. I repeatedly examined his chest but at no time was I able to detect any signs of abnormal conditions of heart, lungs or pleura. He said he had pain in the chest and had a notion that it was caused by heart trouble. After he got up from bed he remained about town for some time and finally went to Tacoma and there consulted some physician, who told him he had heart trouble.

My impression of this case was that Brazgo was neurotic. He fainted in the mine and that gave him an idea that he had heart disease and this thought became an obsession to him. Physically I

believe there was nothing wrong with him but his mental state was that of depression; and I will testify to the above statement of facts in the event a new trial is granted in the case of Stanley Brown vs. the Pacific Coast Coal Company. R. A. ALLEN,

Subscribed and sworn to before me this 11th day of June, 1912.

(Seal) T. J. ANDERSON,

Notary Public in and for the State of Washington residing at Wilkeson, Washington. My commission expires Oct 6th, 1912.

State of Washington,
County of King.—ss.

John Collier, being first duly sworn on oath deposes and says: I was employed as inside foreman in the North No. 1 Electric Slope Carbonado mine during the month of May, 1910. Stanley Brown (alias Stanley Brazzo) was employed under me as laborer in the gangway. One day, during early part of May, I was called to see Brown (alias Brazzo), who had fainted or collapsed in the gangway. I found him in a sort of dazed condition and very weak. He complained of pain in his left side. He said he thought it was trouble with his heart. He said his heart stopped beating. We put him in a car and sent him up out of the mine, and I explained the case to the general foreman of the mine, and advised him not to re-employ Brown (alias Brazzo) again at underground work. I have seen him, (Brown, alias Brazzo) occasionally during the past year and have not noticed any change in his physical appearance since he worked in the mine.

If anything, I should say he has improved in appearance. And I hereby certify that I will testify to the above state of facts in the event that a new trial is granted in the case of Stanley Brown vs. Pacific Coast Coal Company. JOHN COLLIER,

Subscribed and sworn to before me this 13th day of June, 1912.

(Seal) J. H. KANE,

Notary Public in and for the State of Washington, residing at Seattle.

CARBON HILL COAL COMPANY

OFFICE OF SUPERINTENDENT

Carbonado, Washington.

State of Washington,
County of Pierce.—ss.

R. H. Moulton being duly sworn deposes and says: I am accountant for the Carbon Hill Coal Company at Carbonado, Washington. The records of said company show that Stanley Brazzo, also known as Stanley Brown, was employed at the hotel at Carbonado, which is operated by the Carbon Hill Coal Co., as follows: From June 15th, 1910, until August 9th, 1910—and from December 9th, 1910, until February 18th, 1912. That during all of the above named periods he was paid at the rate of forty dollars per month with his board and room furnished free. I hereby certify that I will testify to the above stated facts in the event that a new trial is granted in the case of Stanley Brown vs. Pacific Coast Coal Company.

R. H. MOULTON,

Subscribed and sworn to before me this 12th day of June, 1912.

(Seal) T. J. ANDERSON,

Notary Public in and for the State of Washington, residing at Wilkeson. My commission expires Oct. 6, 1912.

In the United States District Court, Western District of Washington, Northern Division.

No. 1978.

STANLEY BROWN,

Plaintiff,

vs.

THE PACIFIC COAST COAL CO., a corporation,

Defendant.

COUNTER AFFIDAVITS TO MOTION FOR NEW TRIAL.

Comes now the plaintiff, Stanley Brown, by his attorney, H. R. Lea, and to controvert the affidavits of the defendant in support of its motion for a new trial, submits the affidavits of H. R. Lea, Stanley Brown, Erba L. Post, and Sam Worek.

H. R. LEA,

Attorney for Plaintiff.

[Endorsed]: Affidavits. Filed in the U. S. District Court, Western Dist. of Washington, June 22, 1912. A. W. Engle, Clerk. By S., Deputy.

State of Washington,

County of Pierce.—ss.

H. R. Lea, being first duly sworn on oath deposes and says that he is attorney for the plaintiff

above named in the above entitled action, having been retained in the month of October, 1910; that during said month he notified the defendant corporation by letter of his being retained to recover damages for injuries of the plaintiff and in the course of said letter stated: "Should you desire information about the matter I would be very glad to tell you what I know, and if you desire a physical examination you can arrange to have that through me."

That the said corporation at that time took no steps whatever to obtain the information which affiant stated he was willing to give and thereafter affiant commenced action against the defendant and upon serving summons and complaint was referred to F. Greene by the officers of said corporation, he being the same F. Greene whose affidavit is submitted by defendant, and affiant in company with the plaintiff saw the said Greene in his office in Seattle, Washington, on the 26th day of October, 1910, and again offered to give him for the company, such information as he desired which would enable him to make a just and fair settlement of said claim; that at said time, in the presence of the plaintiff, affiant told the said Green that plaintiff had been (Seal)
working at Carbonado, Washington, just prior to his employment with the defendant corporation, and he gave him all other information which was desired by the said Green, and the plaintiff submitted to a physical examination by the defendant's physician; that thereafter from time to time affiant

saw the said Greene and the attorneys for the defendant and at no time did either the said Greene or the said attorneys ask or request information as to the past residence of the plaintiff, for the reason that they had knowledge of such fact; that the defendant at no time used any care or diligence to ascertain such facts, if the information given them by affiant had been forgotten, nor were interrogatories propounded to the defendant covering the points now claimed by the defendant to have not been in its knowledge and which it could not reasonably have obtained by the exercise of due diligence. The whereabouts of the plaintiff at any time since his said injury could have been obtained by the slightest effort through the lodge or union to which he belonged and through acquaintances in Black Diamond and through affiant or by letter to plaintiff;

That on or about the 17th day of May, 1912, and about a week before the commencement of the trial herein the said F. Greene came to the office of affiant in Tacoma, the plaintiff being also present, and negotiations for a settlement of said claim were entered into; that affiant in support of his claim for damages, and to assist the defendant in arriving at a just and equitable amount, informed the said F. Greene fully as to all places in which the plaintiff had worked since his injury, the length of time worked and the wages received, and then informed the said F. Greene as to the time and place where plaintiff was working in Carbonado and the defendant had ample opportunity by the use of the slight-

est diligence to verify the statements then made by (Seal)
affiant and plaintiff to the said F. Greene, and the statements were made with that idea in view that they should be verified and a fair settlement given after such verification.

Affiant alleges that the defendant at all times since the said accident knew that the said plaintiff was employed in Carbonado since his injury and prior thereto, and that by the use of slightest diligence the persons whose affidavits the defendant has presented in support of his motion for a new trial could have been obtained as witnesses at the trial herein.

Affiant further states that such evidence as said witnesses would be able to give at said trial as set forth in said affidavit is immaterial, improper, incompetent and cumulative; that the defendant presented evidence upon said trial covering all matters referred to in said affidavits, except the alleged sickness of plaintiff in May. Affiant further says that at said trial defendant had knowledge of such facts as shown by the questions directed to plaintiff upon cross-examination and that in conducting said cross-examination the attorney for the defendant held what purported to be a letter in asking said questions; That all evidence defendant is now attempting to rebut was disclosed by affiant in his opening statement to the jury and by the testimony of plaintiff, who was the first witness in the case and the said case was not closed until five days thereafter. That there was ample time to have

produced the evidence now alleged to be newly discovered evidence as five says elapsed before the time plaintiff testified and the conclusion of said trial.

Affiant further denies that in his opening statement he admitted the facts stated in Section I of the first ground laid by the plaintiff for a new trial.

H. R. LEA,

Subscribed and sworn to before me this 22nd day of June, 1912. H. G. FITCH,

(Seal) Notary Public in and for the State of Washington, residing at Tacoma.

State of Washington,
County of Pierce.—ss.

Stanley Brown being first duly sworn on oath deposes and says that he is the plaintiff in the above entitled cause; that upon the 26th day of October, 1910, affiant, in company with his attorney, H. R. Lea, visited the office of the defendant company in Seattle, Washington, with reference to his claim of damages against the said company for injuries complained of in this action and was directed to F. Greene, the claim agent for said company; that the said Greene, Lea and himself consulted in regard to a proposed settlement and during the course of said conversation affiant's attorney offered to give the said Greene such information as he desired which would assist him in arriving at a just conclusion in regard to settlement. That among other things, the said Greene asked affiant where he had been employed prior to his employment in the Black

Diamond mine and affiant informed the said Greene that he had been employed at Carbonado, Washington, and affiant answered all other questions which were asked him by the said Greene in regard thereto.

That several days prior to commencement of the trial herein affiant and his attorney met the said Greene in the office of H. R. Lea, at Tacoma, Washington, to consult in regard to a compromise of said case; that in affiant's presence the said Lea told the said Greene fully in regard to places in which affiant had worked and lived since his injury and the length of time which he had worked and the wages received by him, urging the said Greene that (Seal)
by reason of such loss of wages, the offer made by the said Greene was inadequate.

Affiant is acquainted in Black Diamond and a knowledge of his whereabouts in Black Diamond were known by his acquaintances in Black Diamond from whom the defendant could at any time learn his whereabouts; that affiant has neither been asked by any agent of the defendant other than aforesaid, where he has been since or prior to said injuries, nor where he has been employed since and affiant at no time had made a secret of such facts, nor would he have refused to disclose the same upon request.

Affiant further says, as he stated in the trial, that he was sick on or about the time mentioned in the affidavits of Dr. R. A. Allen and John Collier, but affiant denies that he had fainted or collapsed in the mine and denies that he had or claimed to have

heart trouble or that he consulted a physician in Tacoma, who told him that he had heart trouble, but that the only treatment he received was from the said Dr. Allen, who told him he had a cold; that the said Dr. Allen was his physician and his services were paid for by a beneficial association of which affiant was a member and which was supported by monthly contributions from affiant, for medical services.

Affiant further says that Carbonado, Washington, is in fact, nothing more than a mining camp and full information could be obtained as to defendant by inquiry at the office of the company, and that the witnesses whose affidavits are offered in support of the motion for a new trial are all in Carbonado, Washington, and their evidence could have been obtained in time for the trial herein without special diligence.

STANLEY BROWN,

Subscribed and sworn to before me this 18th day of June, 1912. H. G. FITCH,

(Seal) Notary Public in and for the State of Washington, residing at Tacoma.

State of Washington,
County of Pierce.—ss.

Erba L. Post, being first duly sworn on oath deposes and says that she is a stenographer employed in the offices of H. R. Lea and H. G. Fitch, in Tacoma, Washington; that she remembers when the trial of Stanley Brown vs. the Pacific Coast Coal Co. took place in Seattle, Washington; that several

days prior to the commencement of said trial, F. Greene, a claim agent of the Pacific Coast Coal co., same to the office of the said H. R. Lea, and negotiations for the settlement of the said claim were entered into, by the said parties; that her desk is just outside the private office of the said H. R. Lea and that there is only glass between her desk and the said office, and conversations within said office are plainly audible to her; that upon said date she heard the said F. Greene make an offer to compromise the said case and which said offer was refused by the said H. R. Lea, who stated that the same was very inadequate by reason of the great personal injuries that had been suffered by the plaintiff, which injuries were fully explained to the said Greene and she further distinctly remembers hearing the said H. R. Lea explain to the said Greene, the financial loss that had been suffered by the plaintiff and that he told the said Green in detail the length of time the plaintiff had been out of employment by reason of his said injuries and where he was employed since said injuries, and the amount received by him for his work; that she does not remember the exact places that were mentioned, but does distinctly recall the conversation of some length in which the matter was fully discussed.

ERBA L. POST,

Subscribed and sworn to before me this 22nd day of June, 1912.

(Seal) H. G. FITCH,

Notary Public in and for the State of Washington, residing at Tacoma.

State of Washington,

County of Pierce.—ss.

Samuel Worek, being first duly sworn on oath deposes and says that he is the same Samuel Worek who made affidavit on the 10th day of June, 1912, at the request of F. Greene. That he told the said F. Greene the facts as stated by affiatn in this affidavit, but the papers signed were not made out in accordance with statements made to Greene, and affiant cannot read the English language. The true facts to which affiant would testify are: That he knew Stanley Brown when he started to work in Carbonado, Washington, in June, 1910, where he remained until August 9, 1910; that he returned to work December 9, 1910, and remained until February 18, 1912; affiant knows that Stanley Brown was in good health between June 15, and August 9, 1910, and that when he returned in December, 1910, affiant asked the said Stanley Brown what was the matter with him and the said Stanley Brown told affiant that he had been burned by gas and he showed affiant his hands and affiant saw the scars on his hands and face and he told affiant that his side was sore and his rib was broken in and he was not feeling very good. Affiant said that Brown did not look well as he did before he was burned. Affiant did not see the said Stanley Brown spit blood but was told by other boys that they had seen him spit blood during said time in conversation about the same. All of these facts affiant stated to the said F. Greene and affiant will testify to the same

facts should he be called as a witness, if he is in the State, his present expectations being to leave the State about the first of July, for an indefinite period.

SAM WOREK,

I, the undersigned Notary Public in and for the State of Washington, do hereby certify that I read the foregoing affidavit of the said Sam Worek carefully, and explained the same fully to him, and am satisfied that he understands the statements made therein; that he thereupon subscribed and swore to the the same before me this 21st day of June, 1912.

(Seal) R. L. SHERRILL,
Notary Public in and for the State of Washington, residing at Wilkeson.

State of Washington,
County of Pierce.—ss.

H. G. Fitch being first duly sworn on oath deposes and says that he is a citizen of the State of Washington and of the United States, over the age of twenty-one years, and competent to be a witness in the above entitled action; that upon the 22nd day of June, 1912, he mailed Farrell, Kane & Stratton, attorneys for the defendant herein, postage prepaid to 1011 American Bank Building, Seattle, Washington, a true, full and correct copy of the affidavits attached hereto.

H. G. FITCH,

Subscribed and sworn to before me this 22nd day of June, 1912.

(Seal) H. R. LEA,
Notary Public in and for the State of Washington, residing at Tacoma.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1978.

STANLEY BROWN,

Plaintiff,

vs.

PACIFIC COAST COAL COMPANY, a corporation,

Defendant.

AFFIDAVIT OF F. GREENE.

State of Washington,
County of King.—ss.

F. Greene being first duly sworn on oath deposes and says: That he is the same F. Greene mentioned in the affidavit of H. R. Lea made in controversion of the affidavits filed in support of a Motion for a New Trial in the above entitled action; that he makes this affidavit in controversant of the affidavit of H. R. Lea before mentioned. This affiant denies that H. R. Lea told this affiant that Stanley Brown had been working at Carbonado, Washington, just prior to his employment with the defendant corporation, and that H. R. Lea gave him all other information which was desired by F. Greene, as stated in the affidavit of H. R. Lea aforementioned. This affiant states the fact to be that the whereabouts of Stanley Brown prior to his working for the Pacific Coast Coal Company at Black Diamond was never mentioned in the conversation held between H. R. Lea and F. Greene on the 26th day of October, 1910. This affiant further denies that the defendant com-

pany or this affiant had any knowledge whatever of the whereabouts or past residence of Stanley Brown as alleged in the affidavit of H. R. Lea hereinbefore mentioned, and this affiant asserts the fact to be that prior to the trial of the above entitled action, this affiant and the defendant company used every effort and great diligence to ascertain the whereabouts of said Stanley Brown, and wrote letters to the Superintendent of Mines and divers persons at Black Diamond, Washington to obtain information regarding the whereabouts of Stanley Brown prior to the time he came to work for the Pacific Coast Coal Company at Black Diamond; also as to his whereabouts subsequent to his injury at Black Diamond; that in reply to these letters said Superintendent of Mines and divers persons informed the affiant and the Pacific Coast Coal Company that they did not know and were unable to obtain any information as to the whereabouts of said Stanley Brown, and that he had completely disappeared from sight. This affiant states the fact to be that, in the conversation which was held between the affiant and said H. R. Lea on the 17th day of May, 1912, as set out in the affidavit of H. R. Lea, that the whereabouts of Stanley Brown since the time of his injury and prior to his going to work for the Pacific Coast Coal Company at Black Diamond, was never mentioned, and neither did the said H. R. Lea inform or offer to inform said affiant of the whereabouts of said Stanley Brown at said time, and of the amount of wages he had been earning during said times, but said H. R. Lea, upon the oc-

casion of his coming to Seattle a few days prior to the time mentioned, gave this affiant to understand that he had lost track of Stanley Brown himself and that it would be with some effort that he would be able to discover the whereabouts of said Stanley Brown; that the subject matter of the conversation held at this time was limited strictly to the amount which H. R. Lea would demand in settlement of the above entitled action, together with a discussion of the extent of Stanley Brown's injuries. Affiant further states the fact to be that the defendant company and this affiant had no knowledge at any time that Stanley Brown was employed at Carbonado, Washington, prior to or subsequent to his injuries, and further states the fact to be that upon discovering the whereabouts of Stanley Brown during the aforementioned times, by the testimony of said Stanley Brown, in the opening statement of counsel in the above entitled action, he and other agents of the defendant company, immediately got into communication with persons at Carbonado, and made diligent effort to discover some facts about said Stanley Brown, all of which are set forth in the affidavits in support of the defendant's Motion for a new trial.

F. GREENE,

Subscribed and sworn to before me this 28th day of June, 1912.

(Seal) LEROY V. NEWCOMB,

Notary Public in and for the State of Washington, residing at Seattle.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1978.

STANLEY BROWN,

Plaintiff,

vs.

PACIFIC COAST COAL COMPANY, a corporation,

Defendant.

State of Washington,
County of King.—ss.

AFFIDAVIT OF F. GREENE.

F. Greene being first duly sworn on oath deposes and says: That he is the same F. Greene mentioned in the affidavit of Stanley Brown, filed in controversion of the affidavits of the defendant company in support of its Motion for a new trial, in the above entitled action. This affiant admits that on the 26th day of October, 1911, he had a conversation with H. R. Lea and Stanley Brown in the office of F. Greene at Seattle, Washington. This affiant denies that he ever asked Stanley Brown or ever obtained from Stanley Brown any information regarding his whereabouts or his place of employment prior to his coming to work for the Pacific Coast Coal Company; and that this affiant did not obtain any statement from Stanley Brown that he had been employed at Carbonado, Washington, prior to his going to work for the Pacific Coast Coal Company at Black Diamond. This affiant further denies that at the meeting in the office of H. R. Lea

in Tacoma, Washington, several days prior to the trial, that Stanley Brown told this affiant any matters or things pertaining to his whereabouts since his injury or prior thereto, or any matter or things pertaining to the amount of wages which he had been able to earn since his injury or prior thereto. This affiant states the fact to be that these matters were never mentioned in the conversation which was held at that time. The particular subject matter of the conversation being the amount which said Stanley Brown and H. R. Lea would be willing to accept in compromise of the suit then pending, together with a discussion of the plaintiff's injuries. Affiant states the fact to be that the defendant company was unable to locate any of the acquaintances of said Stanley Brown at Black Diamond mentioned in the affidavit of Stanley Brown.

Referring to the allegations in the affidavit of Stanley Brown wherein he alleges that it is stated that the defendant company could have obtained the information set forth in the affidavits in support of the Motion for a New Trial if it had desired to do so before said trial: This affiant denies these allegations and refers to the affidavits filed in support of a Motion for a New Trial, in explanation of said facts.

F. GREENE,

Subscribed and sworn to before me this 28th day of June, 1912.

(Seal) LEROY V. NEWCOMB,
Notary Public in and for the State of Washington, residing at Seattle.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1978.

STANLEY BROWN,

Plaintiff,

vs.

PACIFIC COAST COAL COMPANY, a corporation,

Defendant.

AFFIDAVIT OF F. GREENE.

State of Washington,
County of King.—ss.

F. Greene being first duly sworn on oath deposes and says: That he is the same F. Greene mentioned in the affidavit of Erba L. Post filed in controversion of the affidavits of defendant in support of a Motion for a new trial in the above entitled action. This affiant answering the statements set out in the affidavit of Erba L. Post states the fact to be that the room in which Stanley Brown, H. R. Lea and this affiant held their conversation is separated from the room in which Erba L. Post was seated by a partition and a thick door; that at the time of entering said room and the departing therefrom said stenographer Erba L. Post, was engaged in writing upon the typewriter and this affiant believes that she was so engaged during all of the time of the conversation aforementioned. This affiant states that it would be a physical impossibility for said Erba L. Post to hear any of the conversation that went on in the adjoining room for the reason

that said conversation was carried on in a low tone of voice, and for the further reason that there was a partition between the parties; and for the further reason that said Erba L. Post was making quite a noise in her operation of the typewriter. This affiant emphatically denies that H. R. Lea explained to him in detail the length of time the plaintiff had been out of employment or the financial loss that had been suffered by the plaintiff as stated in the affidavit of said Erba L. Post aforementioned.

F. GREENE,

Subscribed and sworn to before me this 28th day of June, 1912.

(Seal) LEROY V. NEWCOMB,
Notary Public in and for the State of Washington, residing at Seattle.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1978.

STANLEY BROWN,

Plaintiff,

vs.

PACIFIC COAST COAL COMPANY, a corporation,

Defendant.

AFFIDAVIT OF F. GREENE.

State of Washington,
County of King.—ss.

F. Greene being first duly sworn on oath deposes and says: That he is the same F. Greene mentioned

in the affidavit of Sam Worek made in controversion of the affidavits of the defendant herein in support of a motion for a new trial. This affiant states the fact to be that the affidavit of Sam Worek, which the defendant has filed in support of its motion for a new trial, was dictated to this affiant by said Sam Worek, and was written out in longhand and then read carefully by the said Sam Worek personally, and that he agreed to and assented to the statements therein contained. That at said time Sam Worek swore to the statements therein contained before a Justice of the Peace at Carbonado, Washington; and that subsequent to said time the same affidavit was written out on the typewriter and returned to Sam Worek, and he again read it and assented to its contents in the presence of several persons and at the same time said Sam Worek swore to said typewritten affidavit before a Notary Public at Carbonado, Washington, and that said Sam Worek was entirely familiar with all of the contents of said affidavit, and stated them to this affiant exactly as they are set down in said affidavit of said Sam Worek.

F. GREENE,

Subscribed and sworn to before me this 28th day of June, 1912.

(Seal) LEROY V. NEWCOMB,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Affadavits. Filed in the U. S. District Court, Western Dist. of Washington, June 28, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1978.

STANLEY BROWN,

Plaintiff,

vs.

PACIFIC COAST COAL COMPANY, a corporation,

Defendant.

MOTION.

Comes now the plaintiff above named by his attorney, H. R. Lea, and moves this Honorable Court for an order allowing him to file the affidavits of H. R. Lea, R. H. Moulton, R. A. Allen, Samuel Kelleher and Samuel Worek, attached hereto and made a part hereof, in rebuttal of the affidavits of such persons originally filed herein by the defendant, upon the grounds that the facts contained in the said affidavits are newly discovered and of such importance that in the interests of justice and right the same should be brought before the Court for consideration.

H. R. LEA,
Attorney for Plaintiff.

[Endorsed]: Counter Affidavits to Motion for New Trial and Motion for Leave to File Same. Filed in the U. S. District Court, Western Dist. of Washington, Nov. 15, 1912. Frank L. Crosby, Clerk, By..... Deputy.

State of Washington,
County of Pierce.—ss.

H. R. Lea, being first duly sworn on oath deposes and says that he is the attorney for the plaintiff in the above entitled action; that the affidavits in support of defendant's motion for a new trial were served upon him and the same were read by him, but his attention was not especially directed to the fact that it was claimed that plaintiff worked from December 9th, 1910 to February 18th, 1912. Affiant believed no claim was made that he worked continuously for such length of time, but when his attention was called to such fact in the argument of the motion for a new trial, he believed that a typographical error had been made. That affiant thereupon personally saw Samuel Worek, R. H. Moulton, R. A. Allen, and Samuel Kelleher and that each of same were willing and desired to correct mis-statements which had been made in the affidavits presented by the defendant; that affiant personally made a trip to Carbonado two days after the hearing upon said motion, under leave of Court granted him to correct typographical errors in said affidavits and at said time discovered in talking with said witnesses that the said evidence was not only discovered on the part of the defendant since the rendition of the verdict, but had been told to defendant before said verdict was rendered, and that the interests of justice require that such witnesses be allowed to correct their mis-statements and that this Court have the benefit of their sworn statements as to the time the defendant was in-

formed of the same. That affiant did not know of such facts until after the submission of the former affidavit herein and that immediately upon learning the same he prepared forms of affidavits for execution and received the last of the same but a few hours ago. H. R. LEA,

Subscribed and sworn to before me this 15th day of November, 1912.

(Seal) CHARLES L. WESTCOTT,
Notary Public in and for the State of Washington, residing at Tacoma.

State of Washington,
County of Pierce.—ss.

R. H. Moulton, being first duly sworn on oath says that he is the same R. H. Moulton who made affidavit in the cause of Stanley Brown vs. Pacific Coast Coal Company on June 12th, 1912. That said affidavit was made under a misapprehension of fact. That in truth and in fact the records of the Carbon Hill Coal Company, at Carbonado, Washington, show that the said Stanley Brown drew wages for work from June 15th, 1910 until August 9th, 1910, and from December 9th, 1910 until April 12th, 1911, and from August 23rd, 1911 until February 18th, 1912. Affiant has no personal knowledge of the facts other than the record. Affiant talked with Mr. F. Green during the course of the trial of said cause over the telephone, and affiant told the said Green at that time all the facts disclosed in this affidavit except that he did not tell him of the skip in time between April 12th, 1911 and August 23rd, 1911,

during which the true facts are that Brown did not draw wages from said company. That about two weeks after said telephone conversation with the said Green and after the rendition of the verdict in said cause, the said Green came to Carbonado, and at his request, affiant executed the said affidavit of June 12th, 1912. Affiant has not at any time been unwilling or refused to testify in said cause as to said facts, but at all times has been and is now willing to testify as to all such facts.

RALPH H. MOULTON,

Subscribed and sworn to before me this 14th day of Nov., 1912. MILTON PRICHARD,
Justice of the Peace Carbonado Precinct, Pierce County, Washington.

State of Washington,
County of Pierce.—ss.

R. A. Allen, being first duly sworn, on oath says that he is the same R. A. Allen who made affidavit on June 11, 1912, in the cause of Stanley Brown vs. Pacific Coast Coal Company. That during the course of said trial Mr. F. Green telephoned affiant in regard to the said Brown and affiant told the said Green substantially the facts contained in affiant's said affidavit. The said Green did not ask affiant to appear at said trial as a witness, and if he had affiant would have so appeared. That a few days after said conversation affiant learned that said trial was over and that Brown had obtained a verdict. That, about two weeks after said conversation, the said Green came to Carbonado where affiant then

lived, and affiant executed the affidavit of June 11, 1912, at the request of the said Green. Affiant does not know why he was not called as a witness in said cause.

R. A. ALLEN,

Subscribed and sworn to before me this 2d day of Nov., 1912.

(Seal) JOSEPH McCASKEY,

Notary Public in and for the State of Washington, residing at Wilkeson, Wash.

State of Washington,
County of Pierce.—ss.

Samuel Kelleher, being first duly sworn on oath says that he is the same Samuel Kelleher who at the request of F. Green, made and executed for use in the cause of Stanley Brown v. Pacific Coast Coal Company, his affidavit of the 11th day of June, 1912. That in the course of said affidavit, affiant stated that the said Brown had worked almost continuously for affiant from June 15, 1910, until August 9, 1910, and from December 9, 1910, until February 18, 1912. Affiant has, since the execution of said affidavit, examined his records, and said records show that the said Stanley Brown did not draw wages for work from April 12, 1911, to August 23, 1911, and such records conform to the recollection of affiant. This affidavit is given to correct any misconceptions of facts as may have arisen by reason of said affidavit aforesaid.

SAMUEL KELLEHER.

Subscribed and sworn to before me this 11th day of November, 1912.

(Seal) RALPH H. MOULTON,
Notary Public in and for the State of Washington, residing at Carbonado, Washington.

State of Washington,
County of Pierce.—ss.

Sam Worek, being first duly sworn on oath says that he is the same Sam Worek who made other affidavits in the above entitled cause, and makes this affidavit to correct typographical errors in the other affidavits. He remembers that Stanley Brown started to work sometime in December and before Chrismas, 1910, as waiter on the table, and porter and worked almost continuously until about April, 1911. That he distinctly remembers that during said time the said Brown laid off work for short periods. That thereafter the said Brown quit work and left Carbonado and did not return until six or seven months thereafter. The said Brown told affiant upon his return that he had tried working at Hoquiam and Melmont but he could not stand the work on account of his health. He was then given a position again at the hotel at Carbonado where he worked almost continuously until the first part of the year 1912, the exact day or month affiant cannot state. During this period affiant distinctly remembers that the said Brown laid off work from time to time. Affiant was present at the time he quit and remembers the details.

Sam Kelleher at said time ordered the said Brown to work in the wash house, in the presence of affiant, and Brown told the said Kelleher that he could not stand that work on account of his health. Kelleher insisted that he work in the wash house and the said Brown quit. At no time did affiant intend to give the impression that the said Stanley Brown had worked almost continuously at said job from December 9, 1910, intil February 18, 1912, for such are not the facts in the absolute knowledge of affiant who was working at said hotel continuously during at the times mentioned herein. Affiant further says that he and the said Brown received their pay at a monthly rate and that he knows of his own knowledge that the time books of the company do not show short lay offs, and no deduction of wages was made for the same, affiant himself on a number of occasions having laid off for short periods without deduction from his monthly wages therefor.

SAM WOREK.

I, H. G. Fitch, a Notary Public in and for the State of Washington, residing at Tacoma, Washington, do hereby certify that upon this 29th day of October, 1912, before me personally came Sam Worek, and I did thereupon read the foregoin affidavit and statement to him and he stated that he fully understood the contents thereof, and I satisfied myself that he did so understand, and I did thereupon place him under oath and he did swear that he understood the foregoing statement and that the same was true.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 29th day of October, 1912.

(Seal) H. G. FITCH,

Notary Public in and for the State of Washington, residing at Tacoma, Washington.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1978.

STANLEY BROWN,

vs. Plaintiff,

PACIFIC COAST COAL COMPANY, a Corporation,

Defendant.

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

Comes now the defendant, Pacific Coast Coal Company, and without waiving its petition for a new trial herein, moves the court for judgment notwithstanding the verdict found by the jury herein, upon each of the following grounds:

1. Because the plaintiff's complaint does not state facts sufficient to constitute a cause of action against the defendant.

2. Because there is no negligence shown on the part of this defendant.

3. Because from the evidence it appears that the injury, if any, was caused by risks incident to the business in which the plaintiff was engaged,

and which he assumed upon entering into and remaining in the employ of the defendant.

4. Because the evidence shows that plaintiff was guilty of contributory negligence.

5. Because if there is any negligence at all shown, it was the negligence of a fellow-servant.

6. Because all of the dangers and risks which may have caused the supposed injury to Stanley Brown were open and apparent to him and were due to the hazards of the employment the risks of which were assumed by him on entering into said employment and remaining therein.

7. Because the evidence shows that the act of the plaintiff himself proximately contributed to the cause of the injury complained.

8. Because defendant's motion for a non-suit should have been granted.

9. Because there is a failure of proof of the allegations in plaintiff's complaint, and a fatal variance between the allegations of the complaint and the evidence introduced by the plaintiff.

10. Because the motion of the defendant for a directed verdict should have been granted.

11. Because there was no competent or sufficient evidence before the jury to justify the verdict.

12. Because the plaintiff failed to make out a sufficient case to go to the jury.

FARRELL, KANE & STRATTON,

Attorneys for Defendant.

State of Washington,

County of King.—ss.

C. H. FARRELL, being first duly sworn, on oath deposes and says: that he is one of the attorneys for the above named defendant, that he has read the foregoing Motion, knows the contents thereof, and believes the same to be meritorious and well founded in law.

C. H. FARRELL.

Subscribed and sworn to before me this 29th day of June, 1912.

(Seal) LEORY V. NEWCOMB,

Notary Public in and for the State of Washington, residing at Seattle.

Service of the above and foregoing Motion accepted and copy thereof received, this.....day of July, 1912, after the filing of the original thereof with the clerk of the above entitled court.

.....

Attorney for Plaintiff.

[Endorsed]: Motion for Judgment, notwithstanding the verdict. Filed in the U. S. District Court, Western Dist. of Washington, July 8, 1912. A. W. Engle, Clerk. By C., Deputy.

United States District Court, Western District of Washington, Northern Division.

No. 1978.

STANLEY BROWN,

Plaintiff,

vs.

PACIFIC COAST COAL COMPANY,

Defendant.

ORDER.

The above matter having come on regularly for hearing before the above entitled court upon the petition of the defendant for a new trial, the plaintiff appearing by his attorney, H. R. Lea, and the defendant appearing by its attorneys, Farrell, Kane & Stratton, and the court having heard the argument thereon, examined the files and records and being fully satisfied in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the petition of the defendant for a new trial be and the same is hereby denied to which order the defendant excepts and his exception is allowed.

Done in open court this 11th day of February, 1913.

CLINTON W. HOWARD,

Judge.

[Endorsed]: Order. Filed in the U. S. District Court, Western Dist. of Washington, February 11, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.

United States District Court, Western District of Washington, Northern Division.

No. 1978.

STANLEY BROWN,

Plaintiff,

vs.

PACIFIC COAST COAL COMPANY,

Defendant.

ORDER.

The above matter having come on regularly for hearing before the above entitled court upon the motion of the defendant for judgment notwithstanding the verdict, the plaintiff appearing by his attorney, H. R. Lea, and the defendant appearing by its attorneys, Farrell, Kane & Stratton, and the court having heard the argument thereon, examined the files and records and being fully satisfied in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the motion of the defendant for judgment notwithstanding the verdict be and the same is hereby denied to which order the defendant excepts and his exception is allowed.

Done in open court this 11th day of February, 1913.

CLINTON W. HOWARD,

Judge.

[Endorsed]: Order. Filed in the U. S. District Court, Western Dist. of Washington, February 11, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.

United States District Court, Western District of Washington, Northern Division.

No. 1978.

STANLEY BROWN,

Plaintiff,

vs.

PACIFIC COAST COAL COMPANY,

Defendant.

Filed.....

H. R. Lea, for Plaintiff,

Farrell, Kane & Stratton, for Defendant.

By the COURT:

This cause was tried to a jury commencing May 24, 1912, Judge Hanford presiding. July 28, 1912, defendant's motion for a non-suit was denied. On the next day defendant's motion for an instructed verdict was denied and thereupon on the same day the jury returned a verdict in favor of the plaintiff in the sum of $4,000.00.

July 8, 1912, defendant filed herein a motion for judgment notwithstanding the verdict. There is no record indicating that Judge Hanford ever passed upon this motion. The matter next came before Judge Hanford's successor as follows:

On the motion calendar for October 14, 1912, the cause was noted under "Petition for new trial." The matter was then passed for one week. On the October 21, 1912, motion calendar, the cause again appeared under "Petition for new trial," and a controversy arising between the parties as to the ability of the then presiding judge to pass upon the motion for a new trial in the absence of a

"Statement of Facts"; the defendant filed what it claimed to be a statement of facts herein, certified by N. W. Bolster, the reporter who reported the cause at the trial, and the cause was again continued for one week.

On the October 28, 1912, motion calendar the matter appeared under "Petition for new trial and motion to amend statement of facts." Plaintiff thereupon withdrew his motion to amend the statement of facts and conceded the correctness of defendant's proposed statement of facts filed October 21, 1912, and oral argument was then heard upon the defendant's petition for a new trial.

In support of its petition for a new trial the defendant urged the alleged errors set forth therein, also submitting the affidavits attached to its petition for a new trial, filed herein under one cover June 28, 1912. Plaintiff resisted the petition for a new trial, and in support of that portion thereof based upon the ground of newly discovered evidence, submitted the affidavits filed herein under one cover June 22, 1912. In rebuttal of plaintiff's affidavits, the defendant also submitted the affidavits filed herein under one cover June 28, 1912. The plaintiff's attorney, claiming that there was an error as to dates in some of the affidavits last referred to, requested, and was granted leave, to file affidavits confined to the correction of the dates in controversy. The matter was then taken under advisement, and thereafter on November 14, 1912, the defendant filed its opening brief in support of its petition for a new trial and also in support of

its motion for judgment notwithstanding the verdict. The plaintiff replied to this brief by a brief filed December 8, 1912, and defendant's reply brief was filed January 9, 1913. Plaintiff's additional affidavits were filed November 15, 1912.

So far as the motion for judgment notwithstanding the verdict is concerned, the same involve the identical questions which were presented to Judge Hanford on the motion for an instructed verdict which he denied July 29, 1912, and for all practical purposes covered the same questions that he determined in denying the defendant's motion for a non-suit on July 28, 1912. The only new questions, therefore, not already determined against the defendant by Judge Hanford are the claims of the defendant: (a) that the verdict is excessive and appears to have been given under the influence of passion or prejudice; (b) newly discovered evidence, material for the defendant, which it could not with reasonable diligence have discovered and produced at the trial.

Notwithstanding the rulings of Judge Hanford above referred to, it is the duty of his successor in office, on the motion and petition under consideration, to re-examine the various errors therein assigned, including those for the first time presented in the cause, and upon the entire record, grant or refuse the motion and petition, or either of them, upon their merits, uninfluenced by the previous rulings of the judge who presided at the trial.

The defendant's motion for judgment notwithstanding the verdict, is urged upon the following grounds:

1. Because the plaintiff's complaint does not state facts sufficient to constitute a cause of action against the defendant.

2. Because there is no negligence shown on the part of this defendant.

3. Because from the evidence it appears that the injury, if any, was caused by risks incident to the business in which the plaintiff was engaged, and which he assumed upon entering into and remaining in the employ of the defendant.

4. Because the evidence shows that plaintiff was guilty of contributory negligence.

5. Because if there is any negligence at all shown, it was the negligence of a fellow-servant.

6. Because all of the dangers and risks which may have caused the supposed injury to Stanley Brown were open and apparent to him and were due to the hazards of the employment the risks of which were assumed by him on entering into said employment and remaining therein.

7. Because the evidence shows that the act of the plaintiff himself proximately contributed to the cause of the injury complained.

8. Because defendant's motion for a non-suit should have been granted.

9. Because there is a failure of proof of the allegations in plaintiff's complaint, and a fatal variance between the allegations of the complaint and the evidence introduced by the plaintiff.

10. Because the motion of the defendant for a directed verdict should have been granted.

11. Because there was no competent or sufficient evidence before the jury to justify the verdict.

12. Because the plaintiff failed to make out a sufficient case to go to the jury."

The defendant in its petition for a new trial in substance urges the following grounds for the granting of a new trial:

1. Insufficiency of the evidence to justify the verdict in the following particulars: (a) that by the opening statement of counsel and the evidence of plaintiff's witnesses, it appears that the knowledge of the plaintiff of the dangers to be encountered were such that as a matter of law he was guilty of contributory negligence, and also that he assumed the risk; (b) that if plaintiff's injuries were due to negligence of any person it was the negligence of his fellow-servant; (c) that there was not sufficient evidence to justify the amount of the verdict returned.

2. Newly discovered evidence material for the defendant and which could not have been discovered or produced at the trial.

3. Excessive damages appearing to have been given under the influence of passion or prejudice.

4. Irregularity in the proceedings of the adverse party by which the defendant was prevented from having a fair trial.

5. Errors in law occurring at the trial, and duly excepted to by the defendant, in instructing the jury as follows: (a) (The defendant here sets out

with some typographical inaccuracies, the instruction of the court to the effect that the defendant owed both a common law and statutory duty to the plaintiff to observe care in the inspection, prevention and removal of any accumulation of gas in the coal mine, and also owed a duty to furnish not only a reasonably safe place in which to work, but also safe appliances, including the timber required with which to provide and maintain a good and sufficient ventilation to carry out dangerous gases; that this duty could not be delegated to a fellow servant, but if it was sought to be delegated, the person to whom the same was delegated would represent the master and would not be the fellow servant of the plaintiff.) (b) The refusal of the court to grant the defendant's motion for a non-suit and the refusal of the court to grant the defendant's motion for a directed verdict.

While the parties hereto have submitted exhaustive briefs, the plaintiff has not argued the first grounds for its motion for judgment notwithstanding the verdict, namely, that the complaint does not state facts sufficient to constitute a cause of action against the defendant, nor that portion of its petition for a new trial claiming irregularity in the proceedings which prevented the defendant from having a fair trial, nor does it seriously contend for that portion of its petition for a new trial based on excessive damages appearing to have been given under the influence of passion or prejudice.

The remaining questions presented, both by the motion and petition, may be briefly stated to be as follows:

1. That the defendant was not guilty of actionable negligence.

2. That the plaintiff was guilty of contributory negligence, and that he assumed the risk.

3. Newly discovered evidence material for the defendant and which it could not, with reasonable diligence, have discovered and procured at the trial.

4. Error in the instructions of the court excepted to by the defendant.

No useful purpose would be subserved by reviewing each of the several grounds of the petition and motion, and we think it sufficient to say that we have given the entire record, briefs and oral argument careful consideration and are of opinion: (a) that the complaint stated a cause of action; (b) that there was no irregularity in the proceedings, which prevented the defendant from having a fair trial, that has been either pointed out by the defendant or discovered by an examination of the record; (c) there is nothing to indicate that the damages are excessive or that they appear to have been given under the influence of passion or prejudice; (d) that under the evidence and the instructions of the court, the question of the negligence of the defendant, the contributory negligence of the plaintiff, and his assumption of the risk, were questions for the determination of the jury; (e) that the instructions given by the court, to which exceptions were taken by the defendant, correctly

stated the law of the case; (f) while it is doubtful if the evidence claimed to be newly discovered, was of such material and non-cumulative character as to have materially affected the amount of the verdict (it being confined to the physical condition of the plaintiff, and his employment and ability to work, between a period shortly subsequent to the time of his injury and prior to the trial of the cause, and not claimed to be offered for the purpose of defeating his right of recovery, but only as affecting the amount thereof,) the court is unable to say that the defendant has established by a fair preponderance of the evidence, if indeed by any preponderance, that the evidence claimed to be newly discovered was newly discovered, or could not with the exercise of reasonable diligence, have been discovered and produced at the trial.

Finding no prejudicial error in the record, and being satisfied that the defendant is not entitled to a new trial on the ground of newly discovered evidence, the motion for judgment notwithstanding the verdict, as well as the petition for a new trial, will each be denied.

Orders may be prepared in conformity herewith allowing to the defendant proper exceptions.

[Endorsed]: Memorandum Decision. Filed in the U. S. District Court, Western Dist. of Washington, February 8, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1978

STANLEY BROWN,

Plaintiff,

vs.

PACIFIC COAST COAL COMPANY,

Defendant.

BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 24th day of May, 1912, the above entitled cause came on for trial in the above entitled court before the Honorable C. H. Hanford, Judge of said Court, sitting with a jury. The plaintiff appearing by his attorney, H. R. Lea, Esq., and the defendant by Mr. C. H. Farrell of Messrs. Farrell, Kane & Stratton, its attorneys. A jury having been duly and regularly impanelled and sworn the following proceedings were had:

Mr. Lea, the attorney for the plaintiff made the following statement to the jury on behalf of the plaintiff:

"This explosion took place on the sixth level of the Black Diamond Mine. This mine is operated at that place by what is known as the pillar-and-room system of mining. The explosion took place on the sixth level from the surface. The system of mining is to run a diagonal tunnel down into the ground. This tunnel is called a slope and is represented on this diagram by that mark there (showing). Down this slope is run a car track upon

which the material is drawn out of the mine. When the desired level is reached tunnels are projected at right angles to this chute. These tunnels are known as the gangway. It is about 20 feet wide—wide enough to accomodate a car track over which the materials are taken out of the mine, up the slope to the surface. Then as the gangway is projected the miners are set to work upon what are known as the breasts in the face of the mine. In order to get a sufficient transportation system it is necessary to start the breasts up a few feet above the gangway in order that by gravity the coal may go into the cars. Those breasts are worked also on the slope so that when the coal is dislodged from the breast it runs down the chute to the pit at the gangway and from thence is taken on the car loaded on the car.

Mr. FARRELL: It seems to me it would be better to have the witnesses state those facts who know them.

Mr. LEA: We expect to prove that.

The COURT: Go on. The jury will understand this is an outline of the evidence.

Mr. LEA: As the gangway is projected we will show that the men working on the breast extend the first breast up and when the breast has been extended about 25 feet what is known as a counter gangway is run through the coal in between these breasts. As these project up a certain distance the gangway is also projected and then the miners start to work on these breasts, and some are in a ways on this side.

On the day in question Stanley Brown was working in Breast No. 77, so that there were a great many of those breasts, and this is only intended to show briefly and clearly the system in vogue at that time in the sixth level. Now, that shows the methods of transportation by gravity—the coal comes down on the cars and is taken out of the mine. Now there is one great and ever present danger in coal mining. We will show that that danger is the presence of what is known by the miners simply as gas. By those more versed and more careful in their speech, as fire damp, or carburetted hydrogen or methane. There are different names for the same substance. This we will show is merely a mechanical mixture with the coal: It is a colorless, odorless gas, which is found with the coal, and which, as the mining continues into the breast is released from the coal, from the little cells and pores in the coal into the mine. This we will show is a highly dangerous and highly explosive and combustible gas: That by the heat of a flame or any similar heat it burns out and causes an intense heat and also the shock of an explosion. Now we will show that there is one way and one way only of avoiding the dangers caused by this gas, which is ever present, and that is a perfect system of ventilation; the gas being lighter than the air rises to the top and stays more or less along the top of the mine and accumulates behind any projecting piece of coal or timber, and a commotion causes that to mix with the air. We will show that one-eighth per cent. solution of gas and air mixed

is most highly dangerous and two per cent. is not dangerous. We will show that that gas can be detected in one way and one way only, and that is by the use of a safety lamp or some other flame. When a safety lamp, which is, we will show, a flame covered around with an iron mesh screen, which acts on this principle, that the iron being a good conductor of heat carries off the heat from the flame and the heat then is not intense enough to ignite the gas. If this lamp is brought in contact with the gas there is a lessening of oxygen and the flame is higher and there is a blue aureole—you have seen the blue in a gas stove—there is that sort of a flame around the inside. This lamp also in burning generates a certain gas known as carbon dioxide, which prevents the explosion of the gas and is comparatively safe and that can be readily tested, and if there is a 2% solution it can be discovered by the use of this lamp. To avoid the excessive danger of gas we will show that there is but one way to avoid it and that is perfect ventilation which causes a movement of the air—which commingles the gas with the air, and it is then swept out of the mine.

In this particular mine the system of ventilation was by a fan placed at the surface, or some other part of the mine, which propelled the air down the slope. As the air goes to the bottom it follows along until it comes to the first opening; that would be the farthest breast. A brattice, as it is called —in other words a partition, is built up into the breast of the mine about 3 feet from the side wall.

This is built by pillars 6 feet apart and filled in by boards from the ceiling to the bottom, causing an air chamber or passage. Doors or gates are placed along the bottom of the breast. The place between the brattice and the side is called the manway and if that (pointing) comes up there you will understand that the manway is the space betwcen the brattice and the side. There is also a gate across the manway and a gate across the side. To obtain this ventilation the Black Diamond Mine followed the system that I am showing. This gate at the last breast would be opened. Then as the pressure of the air is drawn down the slope the air follows along, as indicated by the arrows, and is forced into the manway, and the brattice work is brought up to within six or seven feet, possibly more or less, from the breast where the miners were working and then the air sweeps along across the face of the mine or breast of the mine, and sweeps away this gas as it oozes out of the pores of the coal where they are working—sweeps it down and into a cross cut. Those cross-cuts as erected in that mine. The first which is called the counter gangway, is the larger, and that is 25 feet from the gangway. Beyond that the cross cuts are built every 50 feet and the air there sweeps down here and into the cross cuts. It then sweeps through the cross cuts and up through the next manway and this being closed (showing) it has no place for it to get up, and it must go somewhere and so it sweeps into the manway, up around the end of the breast and sweeps the breast of air, and then it comes down

here and we come to the second cross-cut. This cross cut is no longer used and the gate is closed in order to force the air across the breast of the mine, because it is the breast of the mine where the gas comes from, and then it runs around each breast in succession until all t he breasts have been washed by the current of air, and out an air well towards the next level. It is a forced air pressure.

Now with this system of ventilation, if it is properly constructed, there can be no danger,—practically no danger of explosion, if it is properly operated.

We will show that this system was not properly constructed and was not properly operated, because there was an accumulation of gas in breast No. 75.

Mr. FARRELL: I object to this statement as to how this mine should be constructed or how it should be operated—how it was constructed it seems to me is a matter for the testimony to show.

The COURT: It is a matter of testimony, but he is telling us in advance what his testimony is going to be, that is according to rule.

Mr. LEA: (continuing) We will show that on the day in question Stanley Brown was employed by this company as a miner; that his duties then consisted in working in one of these breasts—breast No. 74—with a pick. Stanley and his partner would undermine the coal; this breast being about 6 feet high; then would undermine the coal with a pick until there was about 6 or 7 feet under, so that there was an overhanging ledge of coal, and then

holes were bored from 3 to 7 feet, as the occasion required, into the upper part of the coal strata; a high explosive was placed in these holes and fuse extended out, and at the proper time these fuses were lighted and the coal would be broken down and strike the chute which was lined with sheet iron, and the coal would then go down to the pit.

Now, as to the administration of the mine; at night there are fewer men working and on this particular occasion there were fewer men, and there are not the same number of bosses as there are in the day time. At the time this injury happened there was only the one boss, the man we designated as Ignish Righi. Stanley Brown, we will show, came to work on this morning; five days and a half before he was injured; he applied for work in the daytime and sent into the mine for orders; he was directed to go to a certain place. When he got there he found that the coal was too hard and with the tools that he had he could not mine successfully, so he went to Ignish Righi, that man over there with the green tie (pointing); he went to him and told him that he could not mine there and was going home. Righi told him that he would put him to work in a different place. He then put him to work in breast No. 75, where he was at the time of the injury; he worked there, as I say, five days and a half before he was injured. During the night the only one that ever gave orders to these miners in the breast was Ignish Righi; he was the sole representative of the company. Upon him, we will show, devolved the duty of preserving the safety

of the miners. He was what is known as the fire boss, gas tester, or night boss, oh whatever name he might be designated by—he was generally called by the name fire boss. His duties required that before the men went to work he should see that there was a sufficient volume of air flowing through these chambers as I pointed out, to wash away all the gases, which accumulate and ooze out from the coal. It was his duty also, in view of the fact that this, as we will show, was a gaseous mine, that is where considerable gas came out from the coal—that it was his duty to fire each of t he blasts—the miners could not be trusted to fire the blasts, because as we will show, there was considerable gas in the mine and they might blow up all the men in the mine—it is a matter that requires the greatest caution. Ignish Righi was the only one representing the company who went into the breast and examined the mine. It was his duty to furnish the lumber and timber necessary for the brattice. It was his duty to see that each miner was obeying the regulations of the company and using the care required by law.

At about ten minutes after ten on the night of September 17th, 1910, Ignish Righi came into breast No. 74 and found Stanley Brown and his partner Joe Yeshon, that man there (pointing), in the cross cut eating their midnight meal. They had finished mining in under; they had finished boring the holes and had their charges of powder and their fuses fixed. Under the rules of the mine the miners cannot shoot the shots but must wait for Mr. Righi

or the fire boss. He had delayed coming and it was half an hour after they were ready before he came. They had finished their meal and we will then show that he asked those boys, "have you got your shots ready". "Yes, we have had them ready half an hour." We will show the significance of that half an hour is this, that he had reason to know, as any miner would know, that by mining, brattice being about 10 feet away from the breast, that by mining there is a commotion of the air and that very commotion causes a mixture of the gas with the air and it is swept off while if there is not that commotion the gas oozes out of the coal and gradually rises and stays dormant against the top of the mine. We will show that he had every reason, knowing that those boys had not been there working for half an hour, to believe that there would be an accumulation of gas by reason of that very fact that they had waited half an hour. We will show that when they said they had been waiting half an hour that he said "Well, show me your shots." We will show you that it is the duty of the employee to take the fire boss to the breast of the mine and show him where the different shots are and where the fuse is, because it is dark in the mine and it is necessary to save his time, and when he said "come, show me the shots" he was acting within the course of his duty and his right, and when the miners obeyed they were acting within the course of their duty and what they were required to do. He said "come, show me the shots." Stanley and Joe left the cross cut, walked down

the manway to the breast and showed him the shots; but before they went they said to Righi "there is gas in there." Any miner using a safety lamp as these were can tell whether there is gas in a mine and those boys had detected gas and warned Righi that there was gas in the mine. Mr. Righi, we will show, replied, "never mind the gas," or words to that effect; He then followed the usual custom, the boys being at the face and pointing out the shots, used a touch paper, as it is usually called, or an inflamable paper, one that does not burst into flame, only getting red and does not generate a great amount of heat, not sufficient under ordinary circumstances to light the gas; he stuck this into the safety lamp and it then became red. Joe again called his attention to the fact that there was gas there and frightened, he ran out and down the manway and into the cross-cut. Stanley was the man that is under orders to stay there and show him the shots. Stanley did stay there; Righi got his touch taper lighted and touched the fuse that was hanging down from the first shot. The fuse lighted, and as fuses will do, sputtered. Sparks were emitted from the fuse just as you see fire works. Those sparks ignited the gas which was in the breast mixed with the air—"poof" and the explosion had taken place. This explosion is the combination of a burning and an explosion—a rapid burning is an explosion, and there is no sharp line of demarcation between a burning and an explosion. Righi was immediately knocked down the chute into the gangway. He

was there when the boys came out. Stanley was blown against the brattice. Joe, in the cross-cut, of course, escaped danger, the air igniting and washing everything away and there being no chance for him to be burned." "We will show from those facts the company were responsible because, in the first place, they did not have a sufficient system of ventilation to carry off those fumes —those fumes—those gases, because their representative whose duty it was to protect the men failed in his duty in not testing the air for gas to determine whether it was there in dangerous quantities before he fired the shot. We will show that it is gross and criminal negligence to light a shot in the presence of known gases and when this man had been warned, that there was absolutely no excuse or reason for him to have lighted the gases. We will show that a fuse will light gases under certain circumstances, and that such fact is well known. We will show that if the system of ventilation had been perfect; if Righi had not assumed the risk he did in going into the known presence of gas; if he had not negligently failed to test for gas this accident would not have happened and we would not now be before this jury.

Mr. FARRELL: If Your Honor please. I now ask the court to dismiss this case under the statement of counsel, on the ground that plaintiff assumed whatever risk there was that caused the injuries. He said the plaintiff was working in this breast with his partner and that he discovered gas there; that he went down and told the fire boss that

there was gas up there and that it was dangerous, and notwithstanding that fact he went back to the breast with the fire boss and told the fire boss that if he lighted a shot there it would cause an explosion and that he staid there while the fire boss not only lighted the fuse which caused the explosion, but two, preceding that and I say, on his own statement, he has shown here that the plaintiff assumed any risk there was there which caused injury to the plaintiff.

Mr. LEA: Counsel misunderstood my statement or I have not made the case clear. There was only one fuse lighted. I did say that the foreman was warned of the presence of gas, but this man knew there was some gas there, but he did not know how much—it is not his duty to know.

Mr. FARRELL: I object to counsel amending his statement. I made the motion on the statement already made. Counsel stated he told him there was gas there and that he stayed there with him while he was lighting that fuse. That is clearly an assumption of the risk, knowing it all in advance and going into the place of danger with him, and I submit on his own statement that he cannot furnish any proof under that statement which will warrant this jury in finding a verdict for the plaintiff.

Mr. LEA: I would like to amend my statement then.

Mr. FARRELL: I object to the amendment now.

Mr. LEA: If counsel understands it that way I do not intend it to be—

The COURT: I deny the motion. You will have to try this case out, to develop the fact before the court would be warranted in making any ruling as to whether the case can go to the jury or not. Now gentlemen of the jury you will understand that counsel has told you what his expectation is as to the evidence and it is for you to listen to the testimony and judge how fully or how completely the evidence sustains the statement, and decide the case on the testimony of the witnesses after you have heard it.

Exception noted for defendant.

Exception allowed.

STANLEY BROWN the plaintiff, being duly sworn, on oath testified that upon the 17th day of September, 1910, he was employed by the defendant, having been first employed about five and a half days before. He first got a card from Billy Haynes who sent him to the pit boss, who in turn sent him to the Sixth level to Righi, who gave him work on the pillar the first day. Being dissatisfied with this work, Righi sent him to work at breat No. 75 which is on the Sixth level about 3000 feet below the surface each level being about four to five feet lower than the level above.

Witness thereupon explained the operation and ventilation of the mine in the same manner as outlined by his attorney in the opening statement and stated that at the time of the explosion he had undermined the coal about seven feet and his partner had bored one hole on the top and two holes on one side and everything was prepared for blast-

ing. That in all matters regarding the mining Righi was the only person who gave orders to them regarding the mining and that plaintiff never saw any other representative of the mine come to the breast; that Righi was the only person who was allowed to explode the blasts and that, awaiting his arrival, they went to the cross-cut to eat lunch. That at that time the brattice was built eight or nine feet to the face; that there was room for another brattice, as the posts were erected about six feet a part; that the breast was about six feet high and eighteen feet wide; that Righi came along in about half an hour and asked them if the shots were ready and he told Righi they had been ready half an hour, and Righi said "Show me where you have the holes." It is the duty of a miner to obey the orders of a man in the position of Righi, who we generally call the shot lighter, but he was pit boss and everything else as well, as he was the only representative of the mine whom plaintiff ever saw come into the breast in their mine.

"Q. All right, go ahead.

A. I go up the face, you know, and I tell him, I said "Be careful" I said "there is gas inside," sometime—we wait a little while, you know—about half an hour," something like that, and he said "Oh yes," he says "all right" he said "never mind." He is going up there, you know.

Q. Did you know that there was enough gas in the mine, at the time you told him there was gas, to have caused this explosion?

A. Why, I tell him, I can't tell for sure—you can't tell for sure—just I know for sure there is a little gas all the time as soon as I go to the face. If you start to work, you know, you got to examine the mine first if you start to work, because if you got a safety lamp you go to the face slow and you can tell right away about the gas; and I watch myself, and I think he is the man, he is got some kind of experience, you know, before, and I tell him, that, and he going up to the face and he never look at anything. He just take that—some kind of touch paper and stick it in the wire.

Q. Did Mr. Righi make a test for gas?

A. No, No.

Q. You have seen him or other fire bosses testing for gas before.

A. Yes.

Q. How do they test for gas?

A. Any mine I work you got to tell anything to the fire boss or anything like that, if he goes to the face, I see lots of times the fire boss in the mine work—the first thing he go to the face and he look at the gas—if there is any gas in the mine—but Righi, any time he go up I never see if he look at the gas—he take that touch paper—

Q. How do they test for gas; what method does the fire boss use?

A. If you have the safety lamp, if you are going to the face, if you know there is sure lots of gas, you have got to go slow—you go into the face slow.

Q. Did this man have a safety lamp at the time?

A. Righi?

Q. Yes.

A. Sure, he did.

Q. What kind of a safety lamp did he have?

A. He had a different lamp from what I had—he had the wire screen—no glass.

Q. Did you have the same sort of a lamp that he did?

A. No, no, I had a different lamp. I had the glass and he had the wire. I had that kind (showing).

A. Yes.

Q. You had what is known as the Wolf lamp (showing)?

A. Yes.

Q. And he had what is known as the Davy lamp.

A. Yes."

"A. (Mr. LEA) Now what is the effect of the presence of gas upon that lamp, if you know?

A. If you are going slow, for sure gas over there, there is some kind of blue light—you can tell whether there is gas, but you have to be slow—you have to take it slow down—if you pull it quick it will explode just the same, because there is something pulls that light out, but you have to go slow—if there is much gas you have to go slow, and that old gas comes out and as soon as you get a little air that gas comes out of the lamp.

Q. Now you had arrived in your story to where you said he was putting some touch paper in the lamp—now what is that touch paper?

A. Well, they call it touch paper, I don't know what it is—it is called touch paper.

Q. Does it burn?

A. It burns.

Q. Does it flame?

A. No, just a little burn.

Q. It gets red?

A. Yes, that is all, and you know powder or anything red, as soon as you touch it to the powder it lights, you see, and he lighted the touch paper and he never look anything about any gas or anything like that, and I show him that hole and he go in and take the touch paper and stick it to the fuse.

Q. Which fuse was it he touched?

A. It was away on top, at the face. And that is all I see. I never see anything about it, just the blue light all around the fuse and just in a minute it blew everything up and knocked me down and I never knew anything about it, and my partner, he had gone down before me and he gone down—I don't know whether he hear anything about this."

He then testified that after the explosion he found himself knocked down and his eyes and mouth full of dust; that his partner pulled him down to the cross cut where he was when the blasts were discharged. That he had used about seven feet of fuse and it took about seven minutes for this to burn to explode the blast.

"Q. How far did you say that the brattice was at the time of the explosion, how far from the face?

A. I think it was about eight feet, it might be a little more.

Q. Eight feet from the face of the breast to the brattice?

A. Yes sir; it might be a little more, I can't tell about that. I didn't measure it. I know very well I had a chance to build the brattice and put the post.

Q. How far apart were those posts on the brattice?

A. From post to post?

Q. From post to post.

A. Six feet.

Q. In measuring the distance of eight feet, do you mean eight feet from the top of the brattice to the top of the breast, or from the bottom of the brattice to the bottom of the breast where you had undermined.

A. I mean from the face to the brattice.

Q. From the top?

A. Yes sir, from the top. But I know I had a chance to build a brattice before, and I asked Mr. Righi about timbers and planks and he said "All right" I will get them up" and tomorrow or the next day I ask him the same thing and he says "Just all right you get it," but that "all right" never be.

Q. Did he bring you the timbers?

A. I never see before I get hurt.

Mr. FARRELL: We object to that and move to strike out the answer. There is no complaint that there was not brattice or timbers.

The COURT: The objection is overruled.

(Exception noted for defendant.)

Q. (Mr. LEA) Go ahead.

A. That is all I know.

Q. Do you know whether or not the fuse spit fire?

A. I see that.

Q. That particular fuse?

A. I see that blue light."

Witness then testified that he had no time to escape as there was an immediate explosion which knocked him down. Witness then testified that it was the duty of a miner to show the shot lighter or fire boss where the different fuses are and to stay there while they are being lighted, upon request; that he had been engaged in mining about five or six years and during all of that time he had been accustomed to show the shots at request.

"Q. Is there very much light in the mine?

A. No.

Q. How much illumination or light was there in that mine?

A. If you have a lot of light you could see it right there, but if I had a safety lamp just like that you can't see it is right there.

Q. You could just see a little ways—you mean it is dark everywhere except in front of the lamp.

A. Yes.

Q. And how many lamps did you have in the mine at that time?

A. I had one.

Q. How many did the boss have?

A. He had one.

Q. Is it difficult to find with that method of illumination—to find the different places; to be sure that you know where they are?

A. How's that?

Q. Is it so dark that it is necessary to move the lamp around across twenty feet to find the places where the blasts are?

A. Yes.

Q. Do the miners always put in the same number of shots, or do they vary with the different places?

A. You see there is one shot there and another there (showing) and another there and sometimes there is six or seven feet from the shot.

Q. It depends on the formation?

A. But you see if you go over there and I am right there at another shot and if he is over there and I stay right there I show him where another shot is if he shoot this one.

Q. And it is not known in advance just where those shots are—it depends on the formation of the coal.

A. Yes.

Q. And you say it is customary to point out one shot and then another shot and then another shot.

A. Yes.

Q. And then after the fuses are lighted, what do you do?

A. Skip out."

That after the injury, witness was taken to the cross cut and then to the counter gangway, Joe Yeshon holding him by the arm and assisting. That his face was wrapped in some kind of a coat and he was taken to the company's hospital.

"Q. You got burned in the mine?

A. Yes sir.

Q. Tell the jury where you were burned and how badly?

A. I get burned—all my face here and this arm here.

Q. Take off your coat and roll up your sleeve.

(Witness does so.)

Q. You were burned as indicated by the scar—were you burned up above that at all—did you have a sleeve to protect you there—from there down you were burned then—how badly were you burned?

A. Pretty bad, and the skin was burned right off the arm, right there.

Q. Off your hands too?

A. Yes sir.

Q. You lost all your skin?

A. All the skin

Q. From the palm of the hand and all up inside and outside?

A. Yes.

Q. Was this arm burned? (pointing)

A. About that far (showing).

Q. What happend to the skin?

A. Just the same, it peeled off.

Q. How about your face?

A. My face was burned, just rolled up, and after I go in the hospital my skin come off in the hospital.

Q. How long was your face discolored, if at all—did you have a scar?

A. I had a scar—I have the scar now.

Q. On your ears?

A. You can see—you can see it now (showing).

Q. Was your face discolored for any length of time after the injury?

A. It was red and brown.

Q. How long was it red and brown?

A. Seven or eight months, or more than that.

Q. That passed away?

A. Yes, but you can see the scar there

Q. Were you burned on your side?

A. I was burned in there too (pointing).

Q. Is there a scar there now?

A. I don't know.

Q. Is that scar the result of the burn?

A. Yes, I was burned here and hit here at that time—I was hurt here and it pained me all the time and I spit blood and I was spitting blood for over a year, you know, pretty near a year and a half, and it pains me now all the time, I can't work.

Q. Do you remember being examined by Dr. E. M. Brown of Tacoma?

A. The first thing I was off there about five weeks—

Q. You were examined by Dr. E. M. Brown?

A. Yes.

Q. What was the nature of the trouble that you had in your side?

A. Dr. Brown told me—

(Objected to and objection sustained.)

Q. Do not say what Dr. Brown said—tell the jury what you know yourself, what was the symptoms of this trouble in the side.

A. Dr. Brown said—

Q. Don't say what Dr. Brown said—don't talk

when the judge has sustained the objection—just tell what you know yourself.

A. I had a pain in my side and it pained me like anything, and before that I spit all the time blood or something like that, I don't know what the matter with me and I go to Tacoma and I go to Dr. Brown and he examined me and he find, you know, some kind of bone broken, you know, and he tell me there is a bone broke.

Q. Don't say what Dr. Brown told you; he will be here to testify—did you feel pain in the spot indicated by Dr. Brown upon your rib?

A. I did.

Q. What did you feel there?

A. I feel something like, lots of times I see bones brought together like, some kind, I don't know how you say that.

Q. A lump.

A. Some kind of a lump.

Q. Where was that lump with reference to this pain which you complain of; was it in the same place or a different place?

A. Some place where it is paining me, the same place.

Q. Did you feel this pain in your side right from the start?

A. Sure.

Q. Has it ever left you—that pain—does it pain you all the time or just part of the time?

A. All the time."

Witness then testified that it was about five months before he again went to work; that he was

able to earn before injury, as a miner, $3.60 a day and by contract as much as $5.00 a day, sometimes $4.00; that he would have been able to make $5.50 a day where he was working if he had everything alright; that he first went to work at Carbanado waiting in a hotel at $40.00 a month, this being about five months after his injury, where he worked two months and quit because it hurt him to work; that he laid off nearly three months and then went to Hoquiam and worked there for two months; that the burns did not heal for nearly four months and his hand and arm were tender and hurt to touch anything. That at Hoquiam he worked picking out the stones in the bark of logs as they went to the saws, at $2.25 a day; that during this time he was suffering pain. He then quit the job and went to Melmont packing timbers in the mine at $3.15 a day where he worked fifteen days.

"Q. What sort of work were you doing at Melmont?

A. That mining boss he tell me, he says, "You go for a couple of days and packing timber" and after while I begin to change to digging because he had me packing timber."

"Q. After you quit there what did you do?

A. Well, I waited for a while, I don't know how many months, and then I started to wait at Carbonado hotel again, and now I work for maybe a month and a half or something like that and then I quit again and I don't work now, for three months I don't work at all.

Q. Have you quit work or have you failed to work because you didn't want to work?

A. I would work—I feel like to work, but I can't.

Q. Before you were hurt did you work steadily?

A. All the time?

Q. You worked all the time?

A. I worked all the time and I never was sick before in my life. I feel all the time good. I was well and nice and I had some kind of—well now, it looks like if I look at the looking glass I would not look at myself now—if I go to the looking glass if I see myself I am afraid, you see.

Q. What was your apparance before; did you have color in your face?

A. I had a red, nice, and now—

Q. You were strong and healthy, were you?

A. You bet you.

Q. When you were working steadily before were you doing anything but working as a miner?

A. Miner, as miner all the time.

Q. And what wages were you receiving when you were working then?

A. After I work with my partner about three years I work at Carbonado at the time and I work in the tunnel.

Q. You worked steadily for three years?

A. Steady for three years.

Q. You didn't work a while and then leave off?

A. No, stayed there all the time

Q. And what were you making up there?

A. Before I had $3.00 a day and after I had $3.60.

Q. Do you know what the present wages of a miner is?

(Counsel for defendant objects as irrelevant, immaterial and incompetent. Objection overruled and exception noted for defendant)

Q. The union scale.

A. Laborers?

Q. Miners?

A. $3.60 before and now $3.80.

Q. Are you unable to do the work of a miner at the present time or to earn those wages—can you do work as a miner?

A. No.

Q. Well, are you strong enough?

A. No, I can't now. It is too hard a job for me."

The said witness on cross-examination then testified as follows: That he has been in this country about five years and first went to Melmont where he worked in the mine packing timber; that he worked there for a year and then went to Roslyn and then to Pittsburg where he worked for awhile at mining and then went to Carbonado; that he worked there steady for two or three years; that he quit there and the boss gave his place to another and he was unable to get the job back, and after waiting at the table of the hotel for a while he went to Black Diamond and got a job there and was burned about five and a half days after he started to work there; (that in applying for work he first went to the superintendent of the mine who gave him a card to Frank Daniels, the foreman who told him to go to the Sixth level and find Righi);

that no arrangements were made about the amount of pay except through Righi who told him how much he would receive; that they paid according to the number of cars and yards and that posts and brattice and everything was furnished; that he worked the first day on the pillar and after that on the same breast where he was injured; that he went on the shift at three o'clock in the afternoon and worked twelve hours; that it was Righi's duty to inspect the mine before they went to work and to give him orders as to what he had to do; that during this time Righi never inspected for gas; that in working the first day plaintiff did not find any gas but after the first day he did find it. Righi had charge of the lamps and he inspected the lamps of the miners and locked them the first thing when they started to work, but he never saw him make any gas tests at all.

"Q. Did you discover any gas until just before you got hurt?

A. Yes, there was a little, but you know if I see gas and I get some kind of work that chases that gas out as soon as I start to work after that coal starts to run down it makes a little air there and the gas going down, see? At that time I work there I don't see any gas.

Q. There was a little gas in there all the time when you were working there digging out the coal.

A. After I am working I don't see any gas.

Q. Would not the gas escape from the coal every day while you were digging out the coal—wouldn't there be a little gas?

A. A little gas but that gas don't hurt.

Q. Whenever you dig a hole in there some gas would come out.

A. Yes, if you are digging there is gas over there, but you see if you working there is lots of air and all the gas goes down.

Q. And this evening you were hurt you bored how many holes for the shots—three?

A. We had three holes.

Q. Three.

A. Yes

Q. Did you dig those holes or did your partner?

A. Well, I was mining and my partner drilled the holes.

Q. Your partner drilled the holes?

A. My partner drilled the three holes and I was mining in there about seven feet in the bottom.

Q. When you drilled the holes in there there would always some gas come out of the holes?

A. I never see it.

Q. Would you notice gas in there before the night you were hurt?

A. I know there is gas there.

Q. In every mine like the Black Diamond mine, when they bore holes or dig coal there is always a little gas escapes.

A. Yes sir, you know there is gas, but if you are working all the gas comes out.

Q. Where did that gas come from that you noticed in there that night before you got hurt?

A. From the coal.

Q. From the coal that you were digging out?

A. Well, that time after you stop working for a while there is gas forms.

Q. That comes from the coal you were digging.

A. That comes from the coal after you stop working after you are digging, it might come out —I don't know, but if you are working all the gas goes out, you see.

Q. Your partner was drilling the holes?

A. Yes sir.

Q. Was there some gas coming out of the holes too?

A. I don't see that.

Q. There is always a little gas comes out?

A. I don't know anything about that, I don't see it.

Q. How long before you went up in there with the fire boss that you noticed the gas in there in the breast—a couple of hours?

A. Well, I was there about half an hour down in the counter after I had the shots ready.

Q. How did you come to knock off work that night—where did you meet the fire boss that night just before he touched off the shots?

A. I met him down in the gangway, down in the slope.

Q. How did you come to be going down there; was it to get your lunch?

A. No, before, when we were going to lunch we met him down below, but after that he come up to the counter gangway.

Q. Where were you when you first saw the fire boss just before he touched off the shot?

A. On the counter gangway.

Q. How far was that from where you had been working?

A. About forty-five feet

Q. How did you come to go down there; what did you go down there for?

A. We had our shots and everything ready and we going to get our lunch.

Q. You had the shots ready and you went down to your lunch and you were eating your lunch when the fire boss came along?

A. Yes.

Q. Just tell the jury what you said to the fire boss about there being gas up there.

A. Well, I told him that. I say "If careful if you are going up the face. There is gas" I told him.

Q. You told him if he was going up to the place that there was gas up there?

A. Yes, and he said "Never mind gas" he said.

Q. How long before that did you notice gas in there before you knocked off work?

A. I know after I start working there I know the next day.

Q. You knew it was there how long before you quit up there; a couple of hours—you said you knew that there was gas up in there before you met the fire boss—now how long before?

A. No, I don't see the gas that time; as soon as I get the hose and everything ready I tell my partner, I say "We are going to our meal," I don't see gas that time.

Q. You said when you saw the fire boss you told him there was gas up in there and to look out and he said there was no danger.

A. Because any time I go down to the cross-cut to my meal I don't shoot anything before that, not before that day and after I go to the face and I look at the gas and find it many times the gas you see.

Q. There has been gas there several times.

A. Yes, before that and I got to do something and I take that gas out.

Q. Now, when you met the fire boss down there when you were eating your lunch you say you told him there was gas up there and to look out.

A. Yes.

Q. How long had the gas been in there?

A. I suppose as soon as we start to work we started the gas.

Q. How long had you been out of there eating your lunch before the fire boss came along?

A. Just about half an hour, because we finished everything and we were going down to start eating our dinner and it takes about half an hour.

Q. And there was gas coming in there and accumulating when you went to eat the lunch and you thought there would be quite a little by the time the foreman got up there, and that was the reason you told him to look out.

A. Yes.

Q. And he said he would go up and do what—light the shot—what did he want to go up in there for that time?

A. Me?

Q. No, the fire boss, what was he going up there for?

A. To go up to light the shot.

Q. And after you told him there was gas up in there you went up with him, did you?

A. Yes sir, sure because he asked me.

Q. Now just where did you go; did you go clear up to where you had been working?

A. Yes, going right—

Q. To where you had been working?

A. Yes going right—

Q. To where you had been working?

A. Yes

Q. You went along with the fire boss.

A. Yes.

Q. Anybody else go with you?

A. My partner he come after me; he come up and he see the tools and everything in place, you know, and he go down.

Q. The holes which your partner had bored and where you and the foreman went, were right up at the end of the breast?

A. Yes.

Q. And you went right up to the holes with the fire boss.

A. Yes

Q. And you showed him where the holes were?

A. Yes

Q. Who put the fuse in the three holes?

A. I did

Q. You put it in yourself

A. Yes

Q. Which one was it—had he lighted any of them before the explosion took place?

A. He lighted one.

Q. Which one was he lighting when it exploded?

A. Right in there at the face.

Q. How deep were the holes which you drilled

A. That hole is about seven feet

Q. And how much fuse did you have in each hole?

A. I had about seven feet, because if you put the powder at that time I had about two and a half sticks of powder and you have to have it pretty near about seven feet of fuse because you to have pretty near a foot out of the hole, you see, and so I had about seven feet."

("After the usual admonition to the jury further proceedings are adjourned until Monday, May 27, 1912, at the hour of 2 p. m.")

"Monday, May 27, 1912, 2 o'clock p. m. Continuation of proceedings pursuant to adjournment. All parties present as at former hearing."

(Same witness on the stand for further CROSS-EXAMINATION.)

"Q. (Mr. FARRELL). Did they use brattice over in the Carbonado mine where you were working the same as they used up in the Black Diamond mine?

A. No sir.

Q. You had worked in other mines where they used brattice

A. Yes sir.

Q. Used about the same kind as the brattice they were using here where you were working?

A. Yes sir.

Q. In chute No. 57 where you were at the time you were injured or was that the number of the chute?

A. 75.

Q. There was brattice up there, was there not?

A. Yes sir

Q. And did you help to put that up, that was in chute 75?

A. Yes sir."

"Q. How much brattice was there up there in the chute from the cross-cut?

A. Well, there is about, I can't tell, well, it was pretty long—we had forty-five feet away up to the top, you know, and we had it pretty long because we had to keep it up to the face. I can't tell how many feet it was."

The witness then testified that the brattice was made of boards, each length being about six feet long and then as follows:

"Q. How far was it from the cross-cut up to where you were working?

A. I can't tell, about thirty or something like that , I can't tell.

Q. About thirty or forty feet?

A. About thirty, not forty, because we didn't have a forty foot chute.

Q. Then about thirty feet?

A. Thirty.

Q. And there was about twelve feet of brattice that was already up before you were burned, up the chute from the cross-cut.

A. More than that.

Q. Well, how much was there?

A. Well, we had a chute about forty-five feet, you know and I suppose we had about thirty feet of brattice, maybe that much.

Q. About thirty feet?

A. Yes.

Q. So that there was about fifteen feet that there was not any brattice up when you were burned.

A. I don't think there was that much because after, you know the chute is about—after the chute maybe it was about ten feet, more than that.

Q. You did not put up any brattice after you went to work there at 3 o'clock that afternoon, you and your partner didn't put any brattice up that evening, did you?

A. That evening I got burned?

Q. Yes.

A. Well, not because we can't put it up—we don't have any planks at that time—we don't have any timbers—we can't put it that time, but we working just the same.

Q. There should have been some more brattice up there, should there not?

A. Yes sir.

Q. And you would have put it up if you had had the timber there, is that it?

A. Yes.

Q. Did you notice when you went in there that there was not any timber to build the brattice with?

A. Of course I know because I ask him before that day to put timbers in the place.

Q. The day men had put up some brattice had they?

A. Yes

Q. The men that were working there in the day before you went on they had put some brattice that day, the men that were on the day shift?

A. Yes, the men that were working in the day time. Well, I think they put up, not quite—now all I know is that they put up just one post and put about, I think, two or three planks you see, but they didn't build the wall to the roof, and we had to put in one more post in there six feet.

Q. Just what is that bratice used for; what do you want to put up the brattice for?

A. So that we can get the air up there.

Q. So that you could get the air in there—and if there had been timber there you would have put up some more brattice so as to keep the air going in.

A. Yes.

Q. And without the brattice the gas was bound to accumulate there, wasn't it?

A. Well I suppose so.

Q. But the object of the brattice was to keep the air circulating and to keep it clear in there and to brush out the gas.

A. Yes."

"Q. Did you ever see Righi light any shots before the ones that burned you—any other time?

A. Yes

Q. You had been working in there four or five days.

A. Yes sir.

Q. Did you see him light shots?

A. Yes sir

Q. And you used to go out when he hollered "fire"?

A. He lighted all the shots, and if he hollered "fire"—

Q. You would go out

A. Yes I would go down

Q. You would go down to the cross-cut

A. Yes

Q. Now when you went up with him (Righi) at this time how many shots did he light before the explosion took place?

A. Just one—he didn't have time to light another.

Q. Just one?

A. Yes.

Q. Is that the one that caused the explosion, or was it the second one?

A. It was that one, it was that one that caused the explosion.

Q. Did he holler "fire when he started to light it?

A. He didn't have time to fire because it blew up right away.

Q. Did he have a safety lamp with him?

A. He had a safety lamp with him, sure he did.

Q. Is that the kind of a lamp he had with him (showing)?

A. Yes sir.

Q. That is the kind of a lamp he used?

A. I used a different one, but he had that kind.

Q. That was the kind he had?

A. Yes.

Q. Will you show the jury how he lighted that fuse; how much of it was sticking out of the hole?

A. About that much (showing).

Q. We will say that my hand is the hole, now will you show the jury how Righi lighted that.

(Witness does so.)

Q. Show the jury how he lighted the fuse?

A. Light that, and after he make ready he just put it here and he burned this paper and started to burning red.

Q. Was that paper blazing when he touched it with that wire?

A. No, just burning.

Q. Doesn't it light like a match?

A. No sir. And I have a knife and I cut this fuse—this powder

Q. Did you cut it up?

A. I cut it, and some kind of a light come out here.

Q. Was it a blaze or just a spark?

A. Just a spark like, you see, and just as soon as he put it here after you light this fuse and I see the blue light and then it blew up like this (illustrating).

Q. That was the gas that made the blue light?

A. Sure, well it is the gas makes it

Q. Was that down close to the ground where the fuse was? or was it up high?

A. It was about that high (illustrating).

Q. That far from the ground?

A. Yes.

Q. Had he lighted any other fuse just before that?

A. Which other fuse?

Q. Well, you say there were three holes?

A. Three holes. I told you before he didn't have time to light the others because they were farther down and after he lighted this it blew everything right there.

Q. So then the gas exploded when these sparks flew out of the fuse?

A. Out of the fuse, yes, sure.

Q. There was not any blaze or light like a match or anything like that.

A. No, not any.

Q. How far back were you standing at that time?

A. Right behind him, right there. Here is Mr. Lea (illustrating) and I would be right there and he would be right there and I would be behind him.

Q. Six or eight feet away?

A. Not that far.

Q. Did he holler "fire" when he started to light it?

A. He didn't holler that time because he had the three holes more to light after he fired another two holes.

Q. You never helped him before to cut the fuse, did you?

A. Yes, I cut it all the time because I have everything ready.

Q. Did you at any other time besides that?

A. Yes sir.

Q. You went up in there and stayed right with him until he lighted it.

A. Yes.

Q. You didn't have to do that, did you?

A. Well, I don't know whether I have or not, but he called me.

Q. You went along to help him do it?

A. He called me up there

Q. But you went on this occasion?

A. Yes, I will tell you, gentlemen, here is the safety lamp. Suppose the fire boss come to the face, you know, he got gas sometimes in the mine, you see, he got to go slow and look for the gas like that, and another time comes a blue light and it is in through the screen and if he get it slow down, and that gas all come out if you get it in here (showing) see, but if any come out here, if you stick it right there (showing) and it is gas and the explosion takes place you can get out quick—it is so slow, like this.

Q. When you went in there with him and held his lamp up, was he testing for gas then?

A. No sir.

Q. What was he holding the lamp up for?

A. I don't know what he hold it.

Q. Could you see gas or not?

A. I don't see that time, that day after I leave the place.

Q. Didn't you go right up with him when he lighted the fuse?

A. Yes sir.

Q. Did you see gas then when he took out the lamp?

A. I don't look no sir, he is smarter than I am because he is boss, you know.

Q. Then you were back about six feet from him when the explosion took place?

A. About four or five or six feet, I can't tell now.

Q. Now what did he ask you to do when he went up in there—to come up and show him the holes?

A. Yes, after I just come up he says "That's all right" he says after he asked me for to see it, if I got those shots.

Q. You showed him the holes and then you helped him light the fuse?

A. I don't help him light it.

Q. I thought you said you cut the fuse.

A. Yes, before I went down I cut the fuse.

Q. I thought you meant at the time.

A. No sir.

Q. As soon as you showed him the holes then you stepped back and he lighted it.

A. Yes.

Q. Did he holler "fire"?

A. If he lighted all the shots, suppose both of us would holler before some day—sure—but that day, this day he had no time to holler, see?

Q. Did you start to go out after you showed him the hole or did you stop and wait?

A. Eh?

Q. You stayed there and waited after you showed him where the hole was, did you?

A. That day?

Q. Yes, that day that the fire took place.

A. Yes sir, I showed him the hole up at the face, and he go and started to light another hole.

Q. You were going to show him the other after he lighted that.

A. Yes.

Q. And then there was still another hole—three of them altogether.

A. Yes.

Q. You were going to stay there until you showed him all three of them.

A. There is one hole here and another here and a third a little farther.

Q. Before that when you went up with him to show him the holes you used to go right back to the crosscut?

A. Eh?

Q. Other times when you went up to show him the holes, as soon as you showed him the holes would go back down to the crosscut to get out of the way so that you would not be hurt.

A. No.

Q. Did you always stay there while he was lighting them?

A. After he lighted the shots, if he lighted the hole, sometimes—well, he had to go out and I had to go out—both of us.

Q. So that if he hollered "fire" you would get out of the way.

A. Yes.

Q. You were treating with the doctor at Carbonado in May and June 1910, about a month or two before you went to the Pacific Coast Company.

A. Well, not at that time, it was before—I had a little cough or cold, or something like that.

Q. You had a bad cold and you were coughing; yau had lung trouble.

A. I don't have any lung trouble.

Q. Do you remember when you were working in the electric slope, that you had a fainting spell one day and you fell over?

A. Eh?

Q. Now, don't you hear what I said?

A. What?

Q. Do you remember when you were working in the electric slope in May, that you had a fainting spell and you fell over and they had to carry you out?

A. Who carry me out?

Q. Well some of the men there.

A. Yes.

Q. Didn't you?

A. Well maybe, just a little, you know, I was a little sick that time.

Q. You hadn't been well?

Mr. LEA: I object. I think the witness should be allowed to answer the question fully. I don't think he had finished.

Mr. FARRELL: Just what is it—tell the jury what happened to you—you hadn't been well, had you?

A. Well, you know, I had a little cold, you see, at that time and I went to the mine and I started to work and I didn't feel well and I told my partner I say "I work that time on the gangway and I don't shovel at that time, I work in the gangway.

Q. You were shoveling in the gangway, were you not, and you had a fainting spell and you fell over.

A. I say, I told my partner, I say "I don't feel very well today, I guess I go home" and I feel awful bad at that time, you see, you know sometimes you get sick and you can't work and you can't stand up, and I go home that day.

Q. You were unconscious about half an hour; you fainted and were unconscious.

A. No

Q. And the men carried you out.

A. Nobody carried me out.

Q. And didn't the doctor treat you for some time?

A. The doctor he came to see me, and he tell me, he said "It is a cold" you see.

Q. He gave you medicine and he treated you for a couple of weeks didn't he?

A. A week or something like that.

Q. And you went back and wanted to go to work at the same work again and they would not let you

because they told you you were not able to do heavy work.

A. Eh?

Q. You went back to the mine and wanted to go to work shoveling in the gangway and the foreman wouldn't let you because he told you you were not a well man?

A. The foreman tell me that—he tell me, he says he got a man in my place.

Q. He told you you were not able to do the work because you were a sick man, didn't he?

A. Well he never tell me that.

Q. What did he tell you?

A. He tell me, he says, "I got a man in your place" he says "if I could wait a little longer" he said "I could get a chance" and I didn't wait and I went up to the Black Diamond and I got a job over there.

Q. And so you went to work washing dishes in the hotel didn't you?

A. Not before that.

Q. What did you do after that—that was in May 1910, wasn't it—what did you do after you were sick there?

A. Well, I think I worked in the hotel and I worked light because it was hard—it is kind of a hard job in the mines.

Q. After you were sick in the mine then where did you go to work?

A. The first thing I go and ask Mr. Davis if he got some place I could work, and he tell me, he says he got a man in my place.

Q. I understand that, and where did you go to work then?

A. It is pretty hard to get a job that time, it is pretty hard to get a job; times was slack and I go to start to work in the hotel.

Q. You worked in the hotel at light work, didn't you?

A. It is not very light, I worked there outside.

Q. Washing dishes?

A. I don't wash dishes.

Q. You did some choring around there?

A. You have to work in the wash house, washing and scrubbing and everything like that, it is a heavy job.

Q. And you stayed there then until you went over to Black Diamond to work.

A. And after I quit over there I go around every place, but I could not get a job and I got a job in Black Diamond."

The witness then testified that he was treated by Dr. McCormick nearly all the time and Dr. Boyle some of the time.

"Q. Dr. Boyle treated you for the burns on your face and hands and Dr. McCormack also.

A. Pretty near all the time it was Dr. McCormack?

Q. Dr. Boyle came to see you, too, at different times.

A. Yes he came over there sometimes.

Q. He was the assistant doctor there wasn't he?

A. Well, I din't know about that.

Q. Now, you never made any complaint to Dr. Boyle or to Dr. McCormack did you, about your chest being sore or about your rib being broken at all?

A. I told him it was sore here.

Q. What did you tell him was sore?

A. A told him "something the matter here" I said "It is sore this side". "That is all right" he says.

Q. Did he give you any treatment for it?

A. He said "It is just the burn", that is all he said nothing else.

Q. You were not burned there, were you?

A. Sure I was.

Q. Burned inside under your arm?

A. I was burned here (showing).

Q. Did he examine to see whether you had broken a rib?

A. No.

Q. You did not tell him your rib was troubling you, did you?

A. Well, I don't tell him about the rib because I don't know whether I had a rib broke or anything like that—I had a pain there.

Q. You did not make any complaint to him about spitting blood did you—now did you, or didn't you?

A. Well, at that time, you see, after that about a week or something like that, or two weeks, I didn't see very much, but after while all the time it was worse, all the time worse and I start to spit blood and everything.

Q. And you stayed there in the hospital about a couple of weeks?

A. About two weeks.

Q. And then you left the hospital didn't you?

A. Yes, because that doctor he tell me there is enough here and I go to the house—he said "It is all right" he said "You can go."

Q. Did the doctor come over and see you after you came over to the house?

A. And lots of times I call there and I wouldn't go there.

Q. Did he see you afterwards at the house?

A. Yes sir; once he come and I sent a man after those rags and he would not give it to me and salve, and once I went to Tacoma and got back—I don't know how many weeks it was, and I go to the doctor, and it was not McCormack, it was another doctor.

Q. Dr. McCormack and Dr. Boyle.

A. It was Dr. Boyle, and I asked him about rags and salve and he says, he says "What do you want" he says "We don't know you" he says and he would not give it to me.

Q. What was it you wanted?

A. Rags around my hands.

Q. To wrap your hands—so you left Black Diamond then and you went over to Tacoma.

A. About one or two days, something like that, and I get back again.

Q. And you went over there, and did you see Dr. Brown when you first went over there?

A. I guess I see Dr. Brown—the first time I went over there I see Dr. Brown—after I come to Tacoma I see Dr. Brown, yes.

Q. Did you go back to Black Diamond after that?

A. Yes.

Q. How long did you stay there then?

A. That time?

Q. Yes.

A. Well, I don't know, about three weeks, or something like that.

Q. How many times did you go to see Dr. Brown?

A. I just see him once.

Q. And that was when you first went over to Tacoma.

A. After I come to Tacoma I see him.

Q. You saw him once—did you ever see him after that?

A. I see him another time.

Q. How many times altogether?

A. I see him about twice.

Q. You saw him twice altogether?

A. Yes.

Q. What did he do for you?

A. He wrapped the hand and everything and give some kind of oil and salve.

Q. Did he do anything for your rib?

A. Sure, he examined the rib and everything on that side.

Q. You saw him twice altogether then.

A. Yes.

Q. Where did you go to work first after that—who did you go to work for?

A. Well, I don't know, I think Carbonado.

Q. How long was that after you were burned?

A. I think it was about five months.

Q. You did not try to get work any other place after you got burned until you came back to Carbonado, you did not go and ask for a job any place.

A. No, I guess not.

Q. You went back to Carbonado and what did you do there?

A. I started waiting on the table.

Q. Working in the hotel?

A. Waiting on table.

Q. How long did you stay there?

A. I don't know how long I stayed there, I can't tell, about two months, something like that.

Q. And you went down to Melmont, to this mine?

A. No.

Q. Where did you go?

A. After that I go to Hoquiam.

Q. And you were doing heavy work down there, were you?

A. No.

Q. What were you doing?

A. I just pick out the stones out of the logs.

Q. Logging?

A. The logs coming on into the mill and there are some rocks and I had a little pick and I pick them out, out of the bark.

Q. And you went over to this other mine, Melmont?

A. After I came back from Hoquiam I go up to Melmont, and I start to work up there.

Q. You quit of your own accord over to Hoquiam, didn't you, and then you went to Melmont and stayed there how long—three weeks?

A. I worked there fifteen days.

Q. And you got $3.15 a day?

A. Yes

Q. They didn't discharge you, did they—you quit over there too, didn't you?

A. Yes

Q. Just how were you being paid for the kind of work you were doing in Black Diamond, how did they pay you?

A. The paid contract.

Q. Contract work?

A. Yes

Q. And it was depending on how much you would do in the day as to the amount of wages you would earn?

A. They pay over there by the cars and yards and if you put the post and brattice they pay you for it."

"Q. You were making about $3.00 a day.

A. Just a second and I will tell you. After if I got that machine down there and before I get home I have to give it back and I don't do very much, after you start to work anyway, after you start a shift and you work right along and you make advantage, but if you got right there you can't make brattice, and the next day when I buy a new machine and before I get up to the face, you know, it is pretty late again and I don't do much that day, and the next day I earn my wages—I know

the next day I make my wages—I don't know how many, but I load about about eight cars and put a post and build brattice and I think I make it about over two yards, or something like that and fifty cents a car and a dollar and a half a yard, if you put the post it is a dollar and thirty-five cents if you put the brattice, you see—everything—I know that day I make over five dollars, see?"

Witness then testified on redirect examination as follows: That after putting the powder in the hole it was tamped and the hole filled with clay.

"Q. At the time you went back into the mine after eating your supper you and Joe went back into the mine to show Righi the blast, did you know that there was any gas in the mine—were you sure there was gas there?

A. Well, I can tell by this gas, after I leave the place I have to clear everything—I don't expect gas that quick.

Q. It was clear when you left, was it?

A. Yes.

Q. And did you know there was gas there when you told Righi to look out, that there was gas in the mine—what did you mean?

A. Well, I mean that because after I go the first thing to start to work the first day it takes a long time before these boys left, and it takes about two more hours, and after I go there to the face sometimes I find little, not much, gas, just a little, you see.

Q. You do not always find, when you are working into the face of the mine, you do not always find gas when you leave it and come back there.

A. Sometimes if we are going to have our dinner we do not find it sometimes.

Q. There is a difference in the amount of gas that is in the coal in different places, sometimes you find more gas than at other times.

A. After a long time you find gas, but just a short time if you have a cleat place, if you are gone just about fifteen or ten minutes, after you come back you don't find gas.

Q. Are some of the breasts more gaseous than others—sometimes one breast will be gaseous and another will not be.

A. Some breasts don't have much air and sometimes more gas, but some not much.

Q. The amount of gas you come across as you are mining and extending the breasts, differs at different times, does it—sometimes there is no gas in the coal, or little gas and others there is a great deal?

A. Well yes, but at that time if I work over there I can't expect much gas, if I work, I don't see any gas over there any time I work I don't see no gas, but sometimes if I stop working I see a little gas.

Q. Was this, where you were injured, was this in the mine known as the Pacific Coast Coal Company's mine at Black Diamond in King County Washington—it is what is known as the Pacific Coast Coal Company's mine at Black Diamond?

A. Yes."

After further re-cross examination covering the same matters, the witness was excused.

Whereupon Joseph Yeshon a witness for the plaintiff, being first duly sworn testified through an interpreter that he and Stanley Brown worked as partners mining in breast No. 75 for four shifts and that he and Brown were both directed by the fire boss, Righi, to go to work in breast No. 75 and that Righi told both of them the amount of wages they would receive; that at no time did he see any other boss or representative of the mine in the breast and that no one but Righi gave either one of them any orders while working there; that before the explosion he had bored the holes and Stanley had mined and the shots were prepared. The breast was on a pitch and the ground rough.

"Q. How far was the brattice from the face of the mine or the breast?

A. Nine or ten feet.

Q. Was there any other lumber there to build the brattice farther?

A. No.

Q. Had either you or Stanley, in your presence, asked for lumber?

A. The day before, about half a shift before, they asked for the lumber and they did not get any that day.

Q. Who did they ask for the lumber?

A. The fire boss.

Q. Righi?

A. Yes.

Q. Was there anybody else around there that could furnish the lumber except Righi? Any other representative of the mine?

A. No."

Witness then testified that he and plaintiff after finishing the mining and preparing the shots, went to the cross cut to eat lunch and that it is customary for miners to eat their lunches in such places and that they waited about half an hour before Righi came along; that Righi asked them if the holes were ready and he told him they had been ready half an hour.

"A. After that the fire boss says 'Show me where the holes are'.

Q. Who did he say that to?

A. The boss.

Q. Go ahead.

A. After that Stanley told him that every time they go to work they find a little gas in it.

Q. Go ahead.

A. He said 'That is nothing, that the gas is there'. They went up and Stanley show him—

Q. Does he mean that he went up with them?

A. He went up—they went up and he started lighting and he says, right away he says 'Show me the other two'."

"Q. Just a minute before he goes any further,—did Righi test for gas—make a test for gas, with the lamp before he lighted the fuse?

A. No.

Q. Go ahead.

A. When he started to light the fuse he went down to the counter.

Q. Who went down, this man?

A. Yes.

Q. Had he touched the fuse before you left?

A. No, he says he was only getting the paper and the little wire ready.

Q. Heating this wire and getting the touch paper ready, is that what you mean (illustrating)?

A. Yes sir, and he went right away to the cross-cut.

Q. Why did you leave?

A. He don't understand that word.

Q. What was the reason you left at that time?

A. He says he just left—he don't know whether he was to look in there.

Q. Was he afraid there was going to be any trouble there?

A. Yes he was afraid.

Q. What were you afraid of?

A. Why, he was afraid to work in the gas.

Witness then testified that he was afraid because he had never before worked in a place where there was gas; that he saw Righi heat the wire in the lamp; that Stanley had showed Righi one of the holes and was about to show the others; that it was on Righi's orders that they went to the face and that this was the first time that Righi had not found them when they were not tamping the holes.

Q. Did you discover any gas there on other days while you were in breast No. 75?

A. Before that, all the time before they started to work there was a little there.

Q. Did you tell such facts to Righi?

A. Stanley told him.

Q. Were you present when Stanley told Righi?

A. Yes.

Q. On other days than this one day did Stanley tell Righi that he had found gas on the breast?

A. Before that, why they were talking about it, and he said himself that there was a little gas there.

Q. Righi said there was gas there?

A. Righi and they talked it over.

Q. Under whose orders were they working at this time?

A. Him—Righi.

Q. Did Righi, after finding gas, order you and Stanley to quit work?

A. No.

Q. After you went back to the counter or crosscut, as you say, Righi heated the wire, what happened—tell it in your own words.

A. When he started to light it, he says, 'I went to the crosscut'. A little while after he heard something like—he don't know how would explain that, sizzing something sizzed like gasoline and he felt it warm before his face—when the thing sizzed he felt it kind of warm and he fell down on the ground and then he heard him holler 'it is off with me'.

Witness then told about entering the mine and finding Stanley lying against the brattice. He did not see Righi. That he took Stanley under the arm

and dragged him to the crosscut and then the blast went off; that Stanley's arms were burned and the palms of his hands were all wrinkled up and the blood was coming out of the burns, and that his neck and hair was burned, and the skin on his arms was all wrinkled up and in some places the skin was off and in others in little bunches, both arms being badly burned and the skin on his neck, ears and face was in little bunches and it was blistered beneath the skin and that plaintiff was also burned on the side where there was a hole in his shirt. Witness then testified that Stanley stated "What I am burned is nothing but something hurts me on my side" that something hurt him inside.

Witness then testified that Stanley was taken to the hospital and that he saw him there every day; that for the first few days he could not see; that he heard Stanley make complaints in the hospital about the pain in his side and saw him spitting blood when in the hospital. That after about two weeks he was taken to Lewac's house where he saw him every day and saw him spitting blood there. He was there about three weeks. Witness then testified that he worked with Stanley at Hoquiam about six months later and that he was still spitting blood, though not so often, and that he was in poor health, and had to quit because of his health.

"Q. Are you positively sure whether it was on the right side or the left side that he said he was hurt?

Mr. FARRELL.—I think the witness has already said he was hurt on both sides, but the right side was the worst.

Mr. LEA: What I referred to is the internal injury.

Q. Are you absolutely sure whether it was on the right side or the left side that he said he was hurt —where he was complaining of being hurt—his internal injuries.

(Counsel for defendant objects. Objection overruled. Exception noted for defendant).

A. On the left."

"Q. (Mr. LEA) Did you see Stanley after he left Hoquiam?

A. I seen him.

Q. Did you see him spitting blood any after he left Hoquiam?

A. He seen it, but he said he was getting a little better, and he didn't spit so often.

Q. How about the quantity; was there as much blood afterwards?

A. The same, only not so often.

Q. When was the last time you ever saw him spitting any blood?

A. In Carbonado.

Q. How long ago?

A. About six or seven months

Q. About six or seven months ago?

A. Yes."

On cross examination the same witness testified as follows:

"Q. Ask him if he heard Stanley tell Righi, the fire boss, when they were in the crosscut, that there was gas up there and to look out.

A. Yes, he heard him when he said that.

Q. And you went up there with Stanley and with Righi, did you?

A. Yes.

Q. And when Righi was going to light the fuse you came down.

A. When he took that wire to light it in the lamp I came down.

Q. He was afraid the gas would explode and that was the reason he came down?

A. He said he didn't know, but he says he never worked in the gas and he was scared, he said.

Q. He knew that there was gas there when he came down to lunch.

A. He knew there was none there when they went to eat.

Q. He went and got out of the way because he was afraid the gas would explode when he lighted that fuse.

A. He says no, that he went first; that he thought that the other fellows would come right after him.

Q. And Stanley stayed there?

A. He says Stanley stayed there and he said that they come right after him.

Q. They came after the explosion took place?

A. He says he don't know where the other fellow went, he said, he just found this fellow.

Q. Where were you when the explosion took place?

A. In the crosscut, alongside of the manway.

Q. You had got down to the crosscut when the explosion took place?

A. Just as he got in the crosscut the thing happened.

Q. About how far away was that?

A. He would not say how it was, he says, because they were very soon going to start another crosscut.

Q. Thirty or forty feet?

A. He don't know.

Q. Ask him if he didn't know there should have been some more brattice there that evening when they were working.

A. There was—before that there was room for to put some up but there was not any.

Q. There was not any what—timbers?

A. No timber.

Q. Ask him if it was dangerous to work there without brattice being put up on account of the gas being accumulated.

A. No.

Q. Was not the brattice there to keep the air circulating and drive out the gas.

A. They built the brattice for that, for to keep the air there.

Q. And if the brattice was not there the air would not circulate.

A. Yes.

Q. And the gas would accumulate in there where they were working, wouldn't it?

A. Yes''

(Witness excused)

Whereupon Charles F. Pfeiffer, a witness for the plaintiff being first sworn testified that he was a mining engineer of nineteen (19) years experience and having qualified as an expert on coal mines and matters pertaining to the ventilation thereof, and having said that he was acquainted with the pillar-and-room system of ventilation, he was asked to step down to the map and explain the system and theory of ventilation.

"A. The pillar-and-room system of mining is a system which is very generally adopted here, owing to the irregular formation and the irregularity of the seams. That is the one that is in use here." "Of course ventilation is a natural necessity in a coal mine, particularly in order to get rid of the obnoxious gases that are generally found. It is done either by exhausting the air from the mine or driving the fresh air into the mine; practically always by means of an exhaust fan that the air is drawn from the mine and drawing fresh air into the mine. These arrows indicate the current of fresh air into the mine, and it is split here and one portion of it travels down this gangway. Now these rooms have been opened and are worked. They are closed by gates, except this last one. We have here the air passing through this gangway up here into the rooms, and the rooms, in order to carry the air where it is required, are divided by what is called brattice, that is to say, posts are usually placed between the floor and the roof and either a lumber wall is built there or else canvas is suspended and the air then passes up behind that to the face or

breast and along the breast, and then crosscuts are driven from this room to the next and the air passes through that and again around the breast and along the breast and then through the crosscut from that into the next succeeding room and so on back into what is known as the up-cast shaft, and the foul air passes out through that."

"Q. Why is this system of ventilation required?

A. In order to remove the foul air from the mine.

Q. What do you mean by foul air?

A. Of course, in the first place, air is being continually used in the mine by breathing, by illuminants, and so forth, and, secondly, in a coal mine, particularly, the dangerous gases emanating from the coal and from the strata around the coal, and they have to be removed.

Q. What particular gases emanate from the coal; explain how they emanate and what they are?

A. In particular, and probably the one to which you refer, is the carburetted hydrogen, marsh gas or fire damp, known by a great many names. That gas is produced by the decomposition or organic and vegetable matter and is found in the coal seams and in the strata immediately adjacent to the coal seams, and that gas, is known chemically as methyl hydrid. It is a colorless and odorless gas and belongs to what is known as the paraffin series of hydro-carbons and it has a chemical constitution of one atom of carbon to combine with four atoms of hydrogen. The specific gravity is comparatively lighter than air and it is an inflammable gas, highly combustible and when mixed with certain propor-

tions of air forms a violent explosive; that is, the explosion, of course, is simply a very rapid combustion, and if you mix some oxygen into the inflammable gas then the combustion becomes more rapid. That is true up to a certain point and then, as the gas becomes further diluted with air it no longer becomes explosive—it is no longer explosive; and that is the object of ventilation. The object is to bring a sufficient current of fresh air into contact with the gas and to so dilute the gas as to render it harmless and at the same time the current carries it away into the up-cast shaft of the mine and takes it out."

"Q. Is there any other method of removing that gas and keeping a mine safe than by a system of ventilation which brings air in?

A. No, there is no other way.

Q. What constitutes an explosive mixture or a combustible mixture of this marsh gas and air?

A. Well, it varies somewhat, because the gas found in a mine is not absolutely pure carburetted hydrogen, it is not pure methyl hydrid; it is mixed with the paraffin series of foul gases and it varies somewhat, and so the actual mixture will also vary somewhat—probably between five and ten per cent."

"Q. How is this gas tested for; how is it found?

A. Well, in very minute quantities, or practically?

Q. In practical mining.

A. In practical mining, by the use of the lamp or the flame.

Q. Such a lamp as this (showing)?

A. Such a lamp as that.

Q. How do you make the test?

A. Well, when the lamp is introduced into air containing as much as two per cent of the gas, the flame will begin to show signs of the effect. It will begin to flicker and a very slight cap will form; this will grow larger; the flame will flicker and this cap of blue on the flame will grow larger and the gas burning inside the lamp will become larger and larger and a practical miner can judge pretty well by the shape of the flame whether the admixture of the gas with the atmosphere is dangerous or not.

Q. You say that you can discover gas when there is two or three per cent of the atmosphere is gas?

A. I think so.

Q. Is that a dangerous mixture?

A. No."

"Q. And is it difficult to discover a dangerous mixture?

A. I would like to correct that statement. I believe that it is looked upon—if the air in the upcast shaft contains as much as two per cent of gas, conditions in the mine are supposed to be dangerous"

"Q. Is there any difficulty at all for a miner to discover a dangerous mixture?

A. No, not to the miner.

Q. Now, Mr. Pfeiffer, is this outflow of gas from the coal on to the breast a steady outpouring, and if so, whether it is, and how it is, and whether it is not; state fully as you can.

A. It may be and it may not be. The gas is contained in the seams of coal from the adjoining

strata and it may be present throughout the entire seam in small quantity under low pressure, and the emission of the gas may be very gradual and continuous. On the other hand, it may be held in pockets under very high pressure. In that case we have a condition, when in the course of mining one of those pockets is opened, the gas will come out with considerable velocity and rush, and it may last from a very short time to a very considerable time, depending on the size of the reservoir containing the gas. Those are called blowers, I believe.

Q. How far should brattice be brought to the face of the mine to constitute safe ventilation in a gaseous mine?

A. Undoubtedly as close as practicable.

Q. How close is that?

A. Within five or six feet I should say."

"Q. If the ventilation—if there is a sufficient volume of air being pumped into the mine, or drawn out, would you consider it in a safe condition if the brattice were from eight to ten feet from the face?

A. No, not necessarily.

Q. With the assistance of the miners working on the face to stir up the air, would you expect ordinarily that there would be any considerable accumulation of gas on the face?

A. It would depend on the normal velocity of the air current in that particular mine.

Q. Explain that fully to the jury.

A. If the mine has not been productive of very much gas and the quantity of air supplied is sufficient to keep the mine under its normal conditions, free of gas why there would be no need then to bring the brattice right close to the face in order to provide for an eventuality you might simply have happen, but under those conditions, of course, it might be that you would strike a portion of the coal where there would be more gas and the gas might emanate very fast and rapidly and the ordinary conditions might not be sufficient to clear the breast of gas.

Q. If the brattice were from eight to ten feet from the face of the mine and there was a sufficient accumulation of gas after half an hour to have caused an explosion, in your opinion does that or does that not demonstrate the sufficiency of the ventilation?

A. It would naturally demonstrate that the ventilation was insufficient for that particular time."

The witness then testified that fire damp was very likely to be ignited by lighting a fuse in its presence, and that it was customary and necessary to be absolutely certain that there was no gas in the place before lighting a fuse.

"Q. (Mr. LEA) Is there any conflict of authorities among the—or of opinions among the mining engineers as to the propriety of lighting a fuse such as you have there in the presence of known or suspected gas?

Mr. FARRELL: I object to that as calling for a conclusion of the witness; he does not know what

other peoples' opinions are on those things.

The COURT: I think that is something the jury may consider. I will overrule the objection."

(Exception noted for defendant).

"Q. It is well accepted, is it?

A. Well accepted."

Witness then testified that a condition might easily arise that gas would be in a place where the brattice was 8 or 10 feet from the face, and that safe mining in a gaseous mine did not justify the expectation that there was no gas in the chamber half an hour after the work had ceased, nor justify the shooting without inspection.

On account of the dangers of shooting blasts in a gasy mine, the firing of shots are left to a special man, known as the fire boss, to make sure that the firing is done under safe conditions, *i. e.* an absence of gas, there being no other way than by exposing the gas to heat, of effecting an explosion, except in exceptional circumstances of spontaneous combustion. If gas is discovered or suspected the utmost endeavors should be made to clear it out at once by the use of ventilation.

On cross examination the same witness testified that in a gasy mine where gas is continually being released by mining operations, the brattice should be kept as close as possible.

"Q. How close ought it to be, where there is some gas accumulating?

A. Say within eight feet.

Q. From eight to ten feet

A. From eight to ten feet"

"Q. Is it not a fact that gas accumulates more or less when they are mining coal and the conditions are changing?

A. Yes sir, that is in the absence of a ventilating current the gas will accumulate.

Q. When they are drilling to open shafts, the gas will escape more or less in all coal mines.

A. Yes sir, certainly.

Q. And also when they are digging coal.

A. And also when they are digging coal.

Q. Sometimes they are apt to run into a pocket of gas in the ordinary coal mining?

A. Yes.

Q. It will escape more at one time than at another?

A. Certainly

Q. Now, in the ordinary coal mine where brattice is kept up within eight or ten feet that will usually serve the purpose of keeping the chute clear of gas, won't it?

A. Yes.

Q. And as to the duty of coal mining—

A. (Interrupting). May I explain that? May I make a remark about that? It would depend on the condition in the mine. Some mines that are very gasey you have to watch the ventilation and keep the current of air very close to the breast in order to keep it clear. Other mines are not so gasey and it would not be so essential."

Upon redirect examination the witness testified:

"Q. (Mr. LEA) Is it their duty (miners) to provide for any of the ventilation, Mr. Pfeiffer?

A. Not to provide for ventilation.

Q. What do you mean by saying it is the miners duty to build the brattice?

A. Well, the material is generally supplied to the miner and he builds the brattice as far as necessary.

Q. Does he have any responsibility for the circulation of the air?

A. No.

Q. Or is it left to some special person?

A. It is left to some special person.

Q. Who is that special person that generally represents the mine in keeping the mine in proper ventilation?

A. To keep the mine in proper ventilation in mining, it is decidedly the superintendent's throughout the mine.

Q. And what was the duty of the fire boss in that regard?

A. The fire boss, as I understand his duties, he is appointed in particular to look after the gas in the mine and the firing of the shots in the mine, that is to say he has sole charge of the firing of the shots; he has to ascertain at certain intervals—possibly daily intervals in some mines and more frequent in others—whether there is gas in the working places or in the gangway or any place in the mine where men are employed. Prior to firing shots it is distinctly his duty to ascertain whether there is gas in the breast where he is going to fire the shots.

Q. So that he is the representative of the superintendent of the mine in that regard?

A. He is specially appointed for that duty."

"Q. (Mr. FARRELL): But it is the duty of the miner to put up that brattice to keep the air properly circulating, is it not?

A. In the course of his work, yes."

(Witness excused).

Whereupon E. M. Brown, witness for the plaintiff, having been duly sworn, qualified as a practicing physician and surgeon and medical expert and said that he examined Stanley Brown during the latter part of the year 1910, sometime after the alleged injury.

Q. Will you tell the jury, fully, doctor, as you remember it, the condition of Stanley at that time?

A. I have not the notes of the case concerning the time; I thought the case was dismissed or lost, but from recollection I remember that he had quite extensive burns on several parts of the body; one or both hands and arms, if I remember correctly, and there was an injury—well I would state that the burns at that time I saw him, the skin was very red and was in the process of healing, and on his side, the left side below and out from the nipple, there was an injury. I do not know whether there was any burns on the chest or not, but there was evidence of a recent injury, though, on the left chest, There was a nodule, or lump, on one of the ribs, either from an inflamatory condition following a bruise, or a fracture, and there was all evidences of there being pain and tenderness at that place. The breathing was impaired, that is the left chest especially did not expand like the right, and

there was evidence of a recent inflammatory condition to the lungs and pleura. I remember that there was a condition that we speak of as pleurisy and there was a deficient lung expansion. Now, I do not remember exactly the condition of that, aside from the fact that there was a deficient lung expansion on that side, and I remember evidences of injury by the knot or lump on the bone, which might have been from an injury to the bone and periosteum, causing the exudate, or it might have been a fracture there.

Q. In addition to what you saw by physical examination, if you were told that Stanley was spitting blood, would that corroborate what you found there by the physical examination?

A. It would.

Q. Were you able to find those conditions, however, without statements made by the patient—could you adduce your diagnosis upon other than statements he made of his pain and suffering.

A. Yes sir, everything except the spitting of blood, of course that was from him; but the evidence of the abnormal condition of the chest was very evident at that time.

He then testified that he would expect to find great pain coming from the burns and that the injuries are such as would disable a person from carrying on ordinary labor; that he was pale and had the appearance of a weak person, in fact was unable to do anything at that time, on account of the condition of his hands, general condition and physical exhaustion; that he advised Brown that

rest and nourishment were the best treatment, and time alone could cure. Witness was of the opinion that the rib had been broken judging from the examination, as it appeared to be a recent break, on account of the thickening and swelling of the soft tissues about it, and on account of the pleusity which disclosed itself by the examination. That a person suffering from pleurisy has pain at the point of the inflammation which is increased by physical exertion and the patient is less resistant to any future exposure, taking cold or contracting any disease or fever, and along with the pleurisy would come more or less inflammation of the lung itself, so that he might have a crippling of the lung and he would be less resistant to all future exposures incident to life. That the spitting of blood would be an indication of an injury to the lung. This injury might be of short duration or it might keep up for weeks or months.

Q. If a patient such as Stanley expectorated blood for a matter of a year after injuries; what would that indicate as to the permanency of the injury, if anything?

A. Well, that would indicate that there was considerable harm, of course. done to that portion of the lung. A person spitting blood continuously for a matter of two months, we would always look upon it as serious—not necessarily dangerous—it might be over a limited area, but the spitting of blood continuously that way is a serious thing.

Witness then testified that the injury to the plaintiff's lung was beneath the part indicated by

an injured or fractured rib.

Q. Have you examined Stanley recently?

A. Yes.

Q. When did you examine him?

A. I examined him a few days ago within the last week.

Q. Will you tell the jury fully Stanley's condition at that time?

A. Well, he is at this time anemic; he has a low blood pressure, and by the way I did not state that ordinarily with interference of circulation to the heart and lungs you would expect a higher blood pressure, but he has a low blood pressure, indicating a low vitality, and he still has some defect in the lung expansion, that is the lung on the lame side does not expand as fully as the well side, and below and out from the nipple, by running my fingers over the chest I can still feel an unevenness in the bone. There may be a little thickening of the periosteum or a little thickening of the bone itself, so that this is indicating where it hurts him and I find a place that does correspond to the place that seems to elicit pain on pressure; and any pressing in that region he shows evidence of pain, by the way he expressed himself, that is by contracting the muscles and also the quickening of the pulse beat.

Q. That is the cause of the hinderance to the expansion on the injured side—what is that caused by?

A. I don't know for certain what it is, unless it is the condition—it is the condition that caused the stress there a year and a half ago has lessened the lung capacity; that is, a certain amount of the

lung is not functioning, or virtually destroyed. There is not much I would say is destroyed, because I could hear the air circulating through that part of the lung, but there is evidently some, and besides that there is probably—there is adhesions over the lung in the lower part.

Q. Adhesions, did you say?

A. Yes, adhesions.

Q. Explain to the jury what adhesions are.

A. That is, the covering of the lung has adhered to the inside covering of the chest wall, so that the lung in expanding instead of sliding over a smooth surface on the inside of the chest is adherent to it at the lower part, so that when he breathes he does not have the distension of the lung down there on the left side—the ribs do not raise out the same as they do on the other side.

Q. Are those conditions which you find now the conditions which you would expect to find as the result of those injuries received by Stanley, judging by your first examination?

A. They are about what you would look for.

Q. Would you say it was the result of those injuries?

A. That is my opinion.

Q. What, in your opinion, will be the disability of Stanley in the future?

A. Well, he will be a long time in getting his strength—in getting up to be what we call a well man. I come to that conclusion from the fact that after over a year he still seems to be in a weakened condition; that is anemic and frail and granting

that he was a well man before the injury, of course being sick six months, that in a run-down condition, that it would take a good while for him to build up. As to whether he ever gets well, that is strong, of course that is problematical. You can't tell. Of course he may develop disease that he otherwise would not, but if he does not develop any other diseases and continues to improve, it would be a long time. It will be perhaps two or three years from the time he was injured anyway until he would be what you would term a well man.

Q. What are the especial dangers, if any of those adhesions of which you spoke?

A. Well, it is more liable—the lung being adhered itself it does not necessarily incapacitate a person; only in taking cold or suffering from any ill health involving the lungs he would be more liable to pain, and a person with adhesions may always have more or less pain—not necessarily, but as a rule they do have more or less pain, and especially on any occasion where the lung is irritated—any coughing or cold.

Q. What effect would it have on the ability of a person in that condition, to work?

A. Well as long as he has that suffering and pain it would lessen his ability.

Q. Is Stanley a well man now?

A. No, I should say not, judging from my examination—from the low blood pressure.

Q. Are all those conditions which you found conditions which would arise from an injury received by a person by an explosion in a coal mine.

A. They could come from that.

Q. Is there anything unlikely about their being found?

A. No/

Q. Would you expect to find them as you had?

A. We would expect it in this way, that as a certain of number of person with a given injury would be afflicted by such results as he has got, it is one of the results that we would look for—not necessarily—some men might recover with apparently the same injury in a very short time, like a man with a broken rib, one man would be perfectly well in a week and another man would suffer indefinitely.

On cross examination the same witness testified as follows:

Q. Now, are you prepared to say, doctor, just what the condition was with his rib at that time—was it a fracture, do you think?

A. That was my opinion; it was a fracture, but I was not certain at that time; that is, there was no displacement or lack of alignment of the bone, and my opinion was that the bone was injured or it was fractured but I do not think I was very certain whether it was a fracture or merely an injury to the bone.

Q. There was some indication of swelling on the rib.

A. Yes sir.

Q. And that could have been caused by a bruise, I suppose.

A. That could have been caused by violence, or a bruise.

Q. And this lump, or whatever you found there, that would not tend to make him spit blood, would it?

A. Well it could. A man could have a blow on the chest and cause a laceration of the inside tissues without a fracture of the bone. It does not need to have a fracture of the bone in order to have the lungs torn to the extent of bleeding.

Q. Would you think from the lump or the bruise which you found there that it would cause him to spit blood.

A. It was sufficient to have caused that. Now, there may have been other causes, but that was a sufficient cause, and in view of the history that he gave me of the case I believed it to have been the cause.

Q. But you are not prepared to say from the condition which you found that it would cause him to spit blood, are you?

A. No, only as I have said.

Q. He was pretty well healed from the burns when you saw him the first time, wasn't he?

A. According to my recollection they were pretty well healed, but they were badly scarred, that is, they were red and inflammed to an extent that I did not expect his burns to clear up the way that they have.

Q. When you examined him a few days ago, or the last time that you examined him, did you find any scars on his face?

A. A very slight scar.

Q. On his ear?

A. It was very slight anywhere, on his hands or his face, either.

Q. And they are not noticeable without a close examination, are they?

A. No, I think not.

Q. Were there any scars on his hands, that you noticed?

A. I do not think they would be noticed, except by the closest scrutiny.

Q. Pleurisy develops some inflammatory troubles?

A. Yes.

Q. And it can be brought about by a cold?

A. Yes.

Q. Is pleurisy ever permanent—does it continue or is it just for a short time and then disappearing?

A. Well, the results of pleurisy, that is the adhesions are often permanent, that is, it is a very common thing in opening the chest in post mortem examinations to find firm adhesions of the lung to the chest, but the pleurisy, as a disease that the patient speaks of, so far as pain is concerned, is generally not a very long lasting disease, except that when a person has pleurisy then they will frequently have recurrences of pain there; that is, change of weather, like rheumatism, it will cause them pains in the joints. A person will speak of a pain there and that may last all their lives and then it may be aggravated by cold, grip or something like that.

Q. And in a great many cases it disappears and never troubles them again.

A. Yes sir, a great many will think—so far as their feelings are concerned—even if they have adhesions they will not be aware of it.

Q. You are not prepared to say from your last examination that that trouble is permanent, are you?

A. Well, I think that he will always have a less lung power on that side; that is, he will never have the full expansion. There is a certain amount of the lung is incapacitated for further work, so that he will never have as full an expansion on the left side as he would have if he had not had this disease.

Witness then testified that he made examination and did not find any organic troubles other than those mentioned. Upon redirect examination the witness testified that in his opinion upon the first examination, Brown would be unable to work for several months, judging only by the objective symptoms.

Witness excused.

Whereupon George Bucsko, a witness for the plaintiff being first duly sworn testified as follows:

That he had worked in a coal mine nearly all his life until recent years, occupying positions up to night boss, which included the duties of a fire boss, and worked in mines in and around Seattle and Tacoma and is well acquainted with the conditions of the local mines and with the management and duties of the different officials. That it is the duty of the fire boss to examine the mine in the morn-

ing for gas, before anyone is allowed in the mine and to examine all the places and if gas is found, keep men from the work and get the gas out.

Q. Suppose the gas is struck while the miner is working, what is the duty of the fire boss?

A. How's that?

Q. Suppose the miner strikes gas while he is working there—suppose that the gas begins to accumulate after he quits work or while he is at work there.

A. If the miner finds gas while he is working he has to fix his canvas or brattice or whatever it is and try to get it out, and if he can't do that way —if it don't go out, then he is supposed to go down and notify the boss, or the fire boss—of course the fire boss don't work all day.

A miner has no duty as to the ventilation, except the fixing of his own brattice and getting his own air, the material being furnished sometimes by himself on contract work and sometimes by the mine. A fire boss has the further duty of shooting the shots.

A. Well, he goes around and asks the miners "Are you ready for the shots" and if they say "ready" he will go up there and if they are in the place he will go up and ask them "Are you all ready, and where is the holes" and they will show him and I guess he will light them, and I guess that is all there is to it.

Q. What are his duties regarding testing for gas at that time?

A. Oh, he is supposed to see whether that there is no gas there before he lights the shot.

Q. Is there great danger of lighting a shot in a gaseous condition?

A. It is the most danger there is, that is how the explosion happens. If there is gas in a place and he lights it and it don't go off, or it goes off with the shot, that makes the worst kind of an explosion.

Q. Have you heard of any mine that allowed a gas tester or shot shooter or fire boss to explode a blast without first making a test for gas, in a gaseous mine?

A. Well that I could not say, of course there are accidents happens when they take things on their own accord—I have heard of it—I never saw it.

Q. Did you ever know of a mine that allowed that?

A. There is none of them that allows it.

Q. Do the mines have any other men to test the conditions of the atmosphere at the time of those shots while the miners are working there, other than this man that you might call the fire boss or gas tester or shot shooter or whatever he might be called.

A. Not that I know of.

Q. He is the only representative of the mine that goes to the face of the mine.

A. That is all.

Q. Is there any difficulty at all in a man having any mining experience, in detecting gas in sufficient quantities to cause a combustion or explosion?

A. How's that?

Q. Is there any difficulty in detecting the presence of a sufficient quantity of gas to cause an explosion—could a miner fail to discover gas if he makes a test with a safety lamp, if gas were there in dangerous quantities.

A. No he is bound to see it if he tried for it.

Q. It is an easy matter?

A. Sure.

Q. Just a matter of taking the trouble to make the test.

A. That is all.

Q. Now George, have you seen or been in a gas explosion?

A. I have been working with naked lamps there in one and I got scorched myself a little—I went out and ate my lunch.

Q. If there is an accumulation of gas at the breast, what is that an indication of?

A. How do you mean—if there is an accumulation in the face, you mean?

A. Yes, what is that an indication of?

A. Well they have not got good air there.

Q. Insufficient ventilation?

A. Not enough air—not enough ventilation.

Q. If the brattice were eight or ten feet from the face would you expect to find an accumulation of gas if the air were sufficient—if the ventilation were proper?

A. No.

Q. Would any fire boss be justified in assuming

that there was no accumulation of gas, before firing a shot.

A. I don't understand you.

Q. Would a fire boss be justified in believing that there was no accumulation of gas, and fire a shot without making a test?

Mr. FARRELL: I object to that as calling for a conclusion from the witness.

(Objection overruled. Exception noted for defendant).

A. Why if it is a gassy mine he should not.

Q. There would not be any?

A. There would not.

Q. Are you acquainted with the fuse used in igniting blasts (showing specimen to the witness).

A. Sure.

Q. Is there any danger of lighting a fuse of that character in a place where there is an accumulation of gas and if so, state what it is.

A. Sure, where there is gas and if you go to light one of those fuses it is liable to spit out sparks and set the gas off—sometimes the fuse sparks like a fire cracker.

Q. Does the fire boss expect that a fuse may spit fire?

A. I could not say what he expects, but I should.

Q. He should expect it—can there be an accumulation of gas in a breast or face of a mine if the ventilation were proper?

A. Well, if there is plenty ventilation there could not be none.

Q. Whose duty is it to see that there is proper ventilation?

A. The fire boss.

Q. Has the miner any duty in that regard other than building the brattice which he is furnished?

A. No; he has nothing to do with the air any other place—he only has to fix up his own brattice and if his brattice is not fixed up right the fire boss is to notify him and make him fix up the brattice.

Q. If the brattice is insufficient when the fire boss goes around, whose duty is it to see that that brattice is fixed?

A. The fire boss has to tell them to fix their brattice first, because there is lots of men when they are working there they neglect it and they won't fix their brattice—they want to hurry up and get the coal out. So that the fire boss has to make them to fix their brattice.

Q. And if the brattice is insufficient, what is the duty of the fire boss before exploding a blast?

A. Test for gas to see if there is any gas there.

Q. Has the fire boss any right to trust to the statement of men as to the condition?

A. No—a fire boss is not to take a miner's word for anything—he is supposed to look for it himself.

Q. And under every circumstance is he supposed to make this examination before blasting?

A. Yes sir, if the place is known for gas.

Witness then testified that if there was a large blower of gas, the gas would follow the air and there would be a large explosion not confined to

one breast; but that the extent of the explosion depended upon the quantitty of gas. That it is the duty of a miner to obey the fire boss and show him where the shots are located, and he is supposed to do whatever the fire boss tell him to do.

Q. What are the duties—you did not answer my question fully—what are the duties of a miner who is working on the face of a mine in regard to obeying the orders from the fire boss—must he take his orders from the fire boss?

A. Sure.

Q. If the fire boss tells him the conditions are safe, is the miner justified in taking the fire boss' word for that.

A. Yes.

Q. If a fire boss tells a miner that the gaseous conditions are not bad, is the miner justified in accepting the statement of the fire boss and acting accordingly?

A. Well, then he is supposed to go up there and go to work and try it himself and see if there is gas there.

And upon refusal of the miner to obey, the fire boss has authority to order the man from the work but not to discharge him.

Upon cross examination the same witness testified as follows:

Q. When coal miners are digging coal and digging holes for shots, there is more or less gas escapes in all the coal mines in this vicinity.

A. There is a difference in each coal—some coal is more gassy than others.

Q. And the gas will accumulate as they dig the coal more or less.

A. Well, there will be gas—there is some coal that is naturally gassy.

Q. And there will be pockets of gas that will be struck and the gas will accumulate.

A. Sometimes more or less.

Q. The miner can detect that gas as he is working; that is he knows when the gas accumulates, doesn't he?

A. Well, he ought to; he ought to see that his brattices are fixed right.

Q. What is the custom around here in the different mines with reference to building brattice; how do they build it anyway?

A. Well they build it different ways; some of them get a manway and they build it out of plank or laggins and other places they carry it up with canvas.

Q. How close do they keep that brattice built to the face where they are working, what is the custom about that?

A. Well, they put it up as close as they can; so that if there is good ventilation then they don't put it up so close as if it is poor.

Q. Usually they put it up within eight or ten feet, do they?

A. Well they keep it about six feet.

Q. They keep it within six feet of where they are working?

A. Yes sir.

Q. Then the timber is supposed to be furnished by the company, and the men are to build their own brattices?

A. Yes sir, where I worked the timber packers brought it in for them.

Q. The timber packers brought it in for them and they built their own brattice.

A. Yes.

Q. And the brattice is built by the men themselves so as to keep the proper circulation of air and to clear out any gas that might accumulate.

A. Yes sir.

Q. If you discovered gas when you were working in there and you went down and told the fire boss about it, would you go back up there again until he had made an inspection—would you consider it safe to do that?

A. Well, I would go up and fix my brattice and get it.

Q. Assuming that there was not sufficient brattice there and you had been working up there and you knew that the fire boss was going up to light a shot, you would not consider it safe to go up with him, would you?

A. Well, if you was going up there to light a shot and if I had known there was gas there or stuff like that, I would tell him.

Q. You would be afraid to go up with him until he inspected it for gas.

A. I would be afraid sure.

Q. It would not be safe to go up in there?

A. It would not be safe to go up in there.

Q. Suppose you knew there was gas up there and you went up there with him—with the fire boss—would you stay there while he was lighting the shot if you saw he did not make the proper inspection?

A. How's that?

Q. If you went up with the fire boss and you knew there was gas up there before you went up, you would not stay there until he lighted the shot, if he did not make a good inspection.

A. No.

Q. You would go back where?

A. I would go back to the crosscut.

Q. And that is the custom of all miners, is it not?

A. Well, miners, I guess that understands it—if they know there is gas there.

Q. They get out of the way until he makes an inspection and finds everything is all right.

A. Well, of course, they have to go up there and show him about where the holes are.

Q. After they show him the holes then it is the duty of the miner to go back to the crosscut, is it not, before he lights the shot.

A. Well, I don't know how they do. The duty of the miner is to see if there is gas there, and if he is telling him, I don't think it is the duty of the miner to let him go in there alone.

Q. I say, when the fire boss goes up to inspect the gas, if he does not make any inspection before he lights the shot, the miner goes back down to the crosscut, doesn't he,—he doesn't stay there and wait until he lights the shot.

A. He don't have to, no.

Q. And it would not be safe for him to stay there, would it?

A. Not if there is gas there.

Witness then testified saying, That he did not know whether all miners knew the danger of explosion from igniting a fuse in gas or not, saying, some of them does and some of them don't. That the fire boss has charge of the men in the mine and shows them how to build the brattice; and it is his duty to see that the brattice is in good shape, and if there is a leak in the brattice he must see that it is fixed by furnishing the timber which he leaves for them and which they build up as they dig further. The fire boss goes all over the place and is gone sometimes for several hours and in the meantime several length of brattice may be put up following a blast, which only the fire boss can shoot. The fire boss usually works under the underground foreman, who is over him and gives him his orders and in turn takes his orders from the superintendent at the top of the mine.

On redirect examination witness testified that during night shift there is generally no other foreman than the night foreman who performs all the executive duties, and who is over the fire boss. That if the breast is wide and three shots are placed it is the duty of a miner to show the shots in succession and to assist the fire boss, standing by and helping him to illuminate the mine, while the shots are being lighted and he does not leave until all shots are lighted.

After further examination covering the same subject the witness was excused..

Whereupon DOMINICK LEWAC, witness for the plaintiff, being duly sworn, testified that he was acquainted with the plaintiff and lived in Carbonado; that about two months after the plaintiff was burned, he came to his house and asked him to keep him; that he stayed at the house a month steady during much of which time he was in bed; that the next month he was up and around part of the time, but was doing no work; that Brown's face and arms were burned and he saw him spit blood a great many times, the last time being seven or eight months after the injury. That the scars were discolored for about ten months; that during this time the left side was sore and he went after medicine several times; that prior to his injury plaintiff was a strong and healthy man, and he worked two years steady at Melmont and in the rock tunnel at Carbonado, shoveling rock for over a year. Witness was excused.

Whereupon TONY LEVICH, a witness for the plaintiff being duly sworn testified through an interpreter that he was acquainted with the plaintiff before he was burned and he was in good physical condition; that he saw him also in Carbonado after he was burned; that he complained of a sore side and he saw him greasing and putting plasters on the same. That Stanley worked with him waiting on the table, but that Stanley was not strong and played out before night and the other waiters would help him out and do his work.

After further cross-examination witness was excused.

Whereupon TONY SMITH, a witness for th plaintiff being duly sworn testified that he was acquainted with the plaintiff and worked in Melmont where plaintiff started to work packing timber; that he looked weak and was unable to continue the work more than fourteen or fifteen days; that the work he was doing was not hard work but was light work; the timbers they were packing being only six feet, sometimes eight feet long and about four inches thick, and but one being carried at a time.

Witness was excused.

Whereupon Mr. Farrell for the defendant admitted that Mr. Righi was in the employ of the Pacific Coast Coal Company at the time of the injury.

Plaintiff rested.

Whereupon the plaintiff rested. Whereupon counsel for the defendant made the following motion to the Court:

Mr. PADDEN: "If your honor please, at this time the defendant moves the court that a nonsuit be granted in this case and the defendant moves the court to dismiss this case and to take it away from the jury for the reason that the plaintiff has failed to prove a cause of action, for the reason that the evidence shows that the plaintiff has not a cause of action, for the reason that the evidence shows that the plaintiff assumed the risk; for the reason that the evidence introduced by the plaintiff shows that the injury, if any, was caused by the negligence

of a fellow servant of the plaintiff; for the further reason that the evidence shows that the plaintiff has been guilty of contributory negligence.

(Whereupon counsel for defendant argues his motion at length to the Court and cites authorities in support thereof.)

The COURT: I cannot indulge you in reading a multitude of cases to the court, for these negligence trials never would end if I let one side read all the cases they can bring and the other side bring all the other cases they want to read. Negligence has gone into such a mass of matter in the law books, that for every one you read your adversary can produce others, so that you cannot settle anything by reading the cases. The elementary principles of law have got to be applied and each case has got to be decided on its own merits.

I deem it expedient for you to try this case out and get the verdict of the jury on it. Taking the Summers case which you read from as a guide, it is not probable that the granting of this motion would end this litigation, because if the Court of Appeals should do in this case as they did in the Summers case they would send it back here and require the case to be submitted to a jury. I do not wish to make any comments further. The jury have to take the responsibility of deciding what the facts are from the evidence and apply the law as given by the court to those facts and decide the case. I want the jury to understand now that in denying this motion I am not deciding that the plaintiff has made out a case entitling him to damages. I am simply

passing that question on for the jury to decide.

Proceed with the case.

(Exception noted and allowed to the defendant.)

Whereupon RICHARD MITCHELL a witness for the defendant was sworn, and testified that on the 17th day of September 1910 he was a shot lighter in the defendant's mine at Black Diamond, Washington. That at 1:30 p. m. that day he went in to chute No. 75 and set off two shots. That at that time he saw that the place was timbered in pretty good shape and good air travelling. That he was hired by the superintendent and took his orders from Mr. Doll, the mine foreman. That it was customary to inspect the mine every morning and that he got his orders to do so from the mine foreman. That he made an inspection of chute No. 75 the morning of the day on which Brown was hurt, and when he was there at 1:30 p. m. there was plenty of timber in the manway for brattice. That the day after the injury was Sunday, and that he went into chute No. 75 at 3 A. M. Monday morning.

"Q. Did you have anything to do with reference to keeping the brattice up and telling the men how they should do it?

A. It is always practical for the miner to take care of his place, that is his work.

Q. That is the man that is digging the coal?

A. Yes sir, when he becomes a miner he is supposed to take care of his place and also to timber his place and to keep his brattice up in shape.

Q. Is it the duty of the miner to report when he discovers gas when he is digging coal?

A. Sometimes they do; of course if there is gas in the place they generally build brattice; that is the same as if there was a piece of loose rock, it is a miner's work to put up the timber to avoid any fall."

"Q. From the time that you went in there after the explosion took place had there been any further brattice built, from the time you were in there at 1:30 in chute No. 75?

A. From the time I left the place until I came back?

Q. Yes.

A. Yes sir, they built the brattice; when the miner went on on Monday morning that was the first thing he did—it is always customary for the miner to timber his place and build the brattice in place, whatever is necessary."

Witness then testified that the mine foreman instructed him upon beginning work that it was his duty as shot shooter "to examine the places and to go around and see the work and fire the shots in places." That it was their usual round to inspect the mine in the morning.

Witness further testified that an old miner always keeps his brattice up to within four or five feet of the face, leaving himself just room enough to work, for the closer the brattice is to the face the better the air is.

"Q. What is the custom about going in with the fire boss—do they or do they not go in to show him

where the shots are?

A. Well, when there is miners at the face, if a man is at the face he can point out where the shots are at; if he is down at the crosscut he don't do anything. He would say, "I have a shot or two," whatever it may be as a rule he don't climb up and tell him where it is—he don't climb up to show him."

Witness further testified that when miners did show the shot lighter the shots that some miners stayed in while shots were being lighted and others went down to the crosscut where it was safe.

"Q. What are your duties as shot firer?

A. Well, to fire the shots.

Q. Do you test for gas before the men go to work on the change of shift?

A. We make all our usual rounds before the men go into the mine in the morning.

Q. On the change of shift you also make the test?

A. On the change of shift we report to our partner how everything is.

Q. And he makes the test?

A. Yes sir, he follows the men in.

Q. That is one of the regular duties of the shot firer to make the test before each shift goes to work?

A. Yes.

Q. And you make your report in writing about the facts and conditions that you find in each breast?

A. Yes."

"Q. You did not understand my question—is there any other man in authority representing the mine who makes a test of the atmosphere?

A. Yes.

Q. What is that?

A. Yes sir, there is other men that makes the test.

Q. Other than the shot firers?

A. Yes sir.

Q. Who goes around the face other than the shot firers to make those tests?

A. The foreman, he goes around the places.

Q. Does the foreman go into the breast and make the tests for gas or is the foreman attending more to the transportation of the coal there?

A. Well, the shot firers, they look after the places.

Q. They are the ones, are they not, Mr. Mitchell, that do look after those places and see that the ventilation is right?

A. Well, they have other men, the foreman as well, looking after the places also.

Q. In this particular case, in that sixth level, was there anyone that investigated for to determine the condition of the air other than the shot firers, as you call them?

A. Yes sir, the foreman makes the usual rounds.

Q. Where did he test?

A. He makes his usual rounds along the gangway.

Q. Did he go around every day and test those places?

A. Not up in the places.

Q. Well, what were his duties?

A. Well, to see the amount of air that is traveling around the gangway.

Q. Was the duty of the mine foreman—is that one of his duties, to test the air?

A. Sometimes he is through the places, but to see that each and every place is in shape.

Q. Sometimes?

A. Yes.

Q. To see that the shot firers are doing their duty?

A. Yes.

Q. But is it his general duty to go there each day and make the tests, or are the shot firers the only ones that do that?

A. Well, I suppose it is not his general duty to go there every day.

Q. Whose duty is it to go there every day?

A. The fire boss is there every day.

Q. And on every change of shift the fire boss is supposed to make a test, at least that often, to see the condition of affairs and if conditions are dangerous it is his duty to warn the men to keep away from the dangerous conditions, is it not?

A. Well, you see, when a miner starts in in the morning to dig coal he has to timber his place to keep his air up with him—the fire boss cannot be there all the time. It is impossible. The fire boss cannot be there constantly and as the coal probably runs pretty freely they get away ahead and they have to timber it to protect themselves and also to keep the brattice up. That is mining. If a man goes that far ahead he is an injury to himself and he is violating the law of health as well.

Q. Answer my question—I don't think you understand the question.

(Question repeated to the witness.)

A. If there is any conditions that is dangerous he

always has some obstruction in the way, chalk, or something to warn the men.

Q. If he finds an obstruction it is his duty to cause the obstruction to be removed.

A. Yes sir.

Q. And if he finds that the brattice was insufficient, so that the lives of the men in that particular breast or in the whole mine is in danger, it is his duty to see that it is remedied by the miner, is it not?

A. Well, that is if he gets back there in time; it is just as I said, there is sometimes when a man can't be there all the time to tell them in order to keep his brattice up—he has to build his brattice and also to put in timber on account of loose rock there.

Q. That is true, but what I am getting at is this; it is the duty of the shot firer to see that each pair of miners keeps his brattice in shape so that the lives of the other men and of the miners themselves will not be in danger, is it not?

A. They are supposed to do it.

Witness then testified that it is the duty of the shot firer to see that the miners keep their brattice in proper shape.

A. There is always two miners; after the man fires his shots there is miners to trim the loose coals down and leave the place as best they can so that at quitting time the next man comes along he takes tools out and he proceeds to whatever may be done, he sees that the brattice is kept up with his work that is practical miner's work.

Witness further testified that he made an examination of the brattice at 1:30 P. M. and that it was in good condition and properly built up. That after each shot the miners would clear the coal out and then those who came in on the next shift would build whatever brattice was necessary.

"Q. Where is the timber kept with which the miners extend the brattice?

A. It is kept right close by them.

Q. Whereabouts is it kept?

A. It is kept in the crosscut and in the gangway—the material was right up close to them in this chute.

Q. Where was the material—you say there was material there with which the miners could have extended the brattice; where was this material?

A. Right close to them.

Q. Whereabouts?

A. Right in the manway."

"Q. How much lumber did you have there?

A. Well, you could pile up all the lumber you want on a thirty-five degree slope.

Q. How much lumber was there at that time that Stanley and Joe Yeshon went to work there?

A. Well, there was a brattice there at that time.

Q. How much?

A. We don't want to block the manway—we just keep enough material there to put up and as the place goes up you can let lumber down."

"Q. How do you know that there was any timber there at that time?

A. I know that there was timber there when I left the place and there was no new brattice put

up." "There was always timber; there is a man there for the purpose of doing nothing else but packing lumber to the miners when they have any need of it, he always keeps a supply on hand."

Witness then testified that he knew there was timber there and if other miners said different he would say they were mistaken because it was the custom to keep timber in the place all the time; that it was not necessary to make a request for it for men were engaged constantly in packing it in. Witness then testified that the place was in good shape and well timbered when he fired the two shots at 1 P. M. the afternoon Brown was injured; that the mine is a gaseous mine.

"The COURT: You have repeated that question time after time.

Q. (Mr. LEA) Now Mr. Mitchell, if the ventilation is perfect, if there is a sufficient amount of air passing through the mine, would this gas be taken away in due course of time without danger?

A. Well in cases of this kind it don't make any difference what current of air is traveling below, it has to be forced right to the face, by building this brattice it throws the air to the face so that it takes the return.

Q. How large a volume of air was passing through the mine when you made the test that day?

A. I could not tell you now.

Q. Did you make the test?

A. I seen there was a good current of air traveling through there.

Q. Did you make the test with the aerometer?

A. Not that day, no sir.

Q. When did you make that test?

A. I didn't make it at that time—I didn't make it that day.

Q. When did you make it?

A. Well, I don't make it—there is other men to do that kind of work.

Q. There is other men?

A. Yes."

'Q. Did you find it in any other breast that day?

A. No sir.

Q. So that you believed then, that the miners would be justified in going into that place to work.

A. The miners were perfectly safe to go in there to work and if they are keeping their brattice up they would have been perfectly safe."

"Q. (Mr. LEA) Now Mr. Mitchell, if the ventilation is perfect if there is a sufficient amount of air passing through the mine, would this gas be taken away in due course of time without danger?

A. Well, in cases of this kind it don't make any difference what current of air is traveling below, it has to be forced right to the face,—by building this brattice it throws the air to the face so that it takes the return."

Witness then testified that if the usual quantity of air was passing through the mine it might or might not remove the gas that might come from the coal, with a brattice eight or ten feet from the face, it depending upon whether or not a feeder or pocket of gas was struck, when it would take a big current of air.

Witness then testified as follows:

"Q. If the ventilation is proper, however, all the noxious gases are taken away and there is safety in the mine.

A. Yes sir, provided there is safety in their keeping their brattice up.

Q. Can you tell me under what conditions there can be a dangerous accumulation of gases in the mine if the ventilation were kept up as it should be?

A. What do you say?

(Question repeated to the witness).

A. Sometimes there is a feeder—what you call a feeder; in going in through new ground there is quite a lot of gas comes out.

Q. Where a reservoir is tapped?

A. Well, we call it feeders in the mining.

Q. It is a pocket of gas that is tapped?

A. Yes."

"Q. I say the explosion follows the gas so far as the gas goes, and if the blower is of sufficient size and it is ignited by contact with heat, then there is an immense explosion following down through the air course.

A. Well, where there is any gas of that kind it is always kept up and looked after and there is no occasion of that kind.

Q. I say that that is what would happen, is it not?

A. I suppose it would."

"Q. The ventilation must be sufficient to take care of the ordinary gases that come from the mine, or the ordinary small pockets mustn't it—reasonable

care, you would say, would require that, wouldn't you?

A. Sometimes there is feeders that exist, that if they keep the brattice right up close, and a large current of air, it comes working out, and as the gas works out the air keeps a traveling.

Q. No matter how much gas there is in the mine, there is no danger to human life—that is this explosive gas—there is no danger to human life unless it is brought in contact with flame, is there, or intense heat.

A. If a man would go and put a light in any amount of gas there is danger."

"Q. If you, as a fire boss or fire tester, whatever you call yourself, would go into a mine to shoot shots and you should see the ventilation was imperfect by reason of imperfect brattice, you would think would you not, that it would be necessary for the safety of the miners in the mine to bring the brattice up before the shot was fired, in order not to expose the gases to ignition?

A. Well I should think myself it would be.

Q. That is one of your duties?

A. Yes.

Q. You are under orders from the mine to do that?

A. Yes.

Q. And all gas testers are under orders to see that the conditions are perfect before shooting a shot.

A. Well, I would not want to shoot any shots myself—

Q. (Interrupting) You are under orders to that effect.

A. That is our orders.

Q. And you are also under orders as every other fire boss is, to make a specially careful test before exposing such gases as they may be in a mine to dangers of ignition by exposing it to an open flame or sparks, or anything of that character—it is more important, is it not, Mr. Mitchell, to make that test for gas which you say is one of the duties of a man in your position, just before exposing the atmosphere of a mine to a flame, than any other time in the day, is it not?

A. It is always practicable for a man before he exposes anything, to examine what is there.

Q. You are under orders to do that, and that is the most dangerous time, and the only danger, practically, of ignition, granting that the men themselves are not negligent, or the lamps are not imperfect, isn't that so?

A. Well that is most particular work.

Q. And in case there is an explosion at that time it would endanger not only the lives of the gas tester and the workmen who are assisting him in that breast, but the men in the other breasts?

A. Well, that all depends on whether there is enough to extend that far.

Q. So that the safety of the miners depends upon the gas tester in making a test for gas before exposing the atmosphere to flames or sparks which might cause ignition.

A. Well, the miners depends a good deal on themselves in mining—the miner—the fire boss can't be with them all the time.

(Witness excused).

Whereupon LEON SECCOND, a witness for the plaintiff being first duly sworn testified that he was working for the defendant company packing timbers on the day Brown was injured, working on the night shift. That he carried up timber to the place where Brown was working that afternoon and evening with which to make brattice; that he was not in the breast after plaintiff was burned until the next Monday morning and he saw timbers there at that time. On cross examination witness testified as follows:

Q. (Mr. LEA) You say Mr. Righi asked you to take the timber up there in breast No. 75.

A. Yes sir.

Q. What time of the day did he ask you to take that timber there?

A .Saturday night.

Q. Do you know what day Stanley was injured—what day of the week?

A. I don't know which day.

Q. You don't know—then you don't know whether it was the same day that Mr. Righi told you to take the timber up or not?

A. Yes, Sunday.

Q. It was the same day, was it?

A. Yes.

Witness then testified that he remembered Righi telling him to take some timber to breast No. 75 where plaintiff was working, but he did not tell

him it was all gone. Witness says there was some there.

Witness excused.

Whereupon BENJAMIN ALLEN, a witness for the defendant, being duly sworn, testified, that on the 17th day of September, 1910, he was night fire boss in the mine of the defendant; that Mr. Christenson was superintendent. Mr. Doll was the witness' foreman, and that Righi and another shot lighter were under the orders of the witness, and took instructions from him and reported to him. Witness corroborated the testimony of other witnesses wherein they said it was the duty of the miner to build brattice; and further said that brattice should be kept up within six feet of the face.

Q. Would you say that it was safe to work in a mine like the Black Diamond mine where the brattice was back from fifteen to eighteen feet.

A. It is not safe.

Q. What is the object of that brattice?

A. The object of the brattice is to keep the current of air at the face.

Q. Whose duty is it to build the brattice?

A. The miners'.

Q. The miners' duty?

A. Yes sir.

Q. Do you know whether there was any timber there on the evening that Brown was injured, or not?

A. There was timber there and lagging in the manway when I went in there after the gas was exploded.

Q. How long after the gas was exploded were you in there?

A. I should think it would be about half an hour, or twenty minutes afterwards.

Q. You went in right after the explosion took place.

A. Right after, yes.

Q. Did you see any timber there in the manway at that time?

A. Yes sir.

Q. And what was that timber there for?

A. It was lagging and props, for building the brattice.

Q. How far back was the brattice then from the face of the chute where he was working?

Q. Well I should judge it to be about fifteen to eighteen feet.

Witness then testified that in his opinion the firing of the shot at this time extended the face back about five feet and further said that he thought it was dangerous to mine in that place with brattice eight or ten feet from the face.

That before the blast, the brattice was about ten feet from the face, which would leave room for another brattice. That it was the miner's duty to build the brattice and he considered it unsafe to work in that place with the brattice in that condition. Witness then testified that the Black Diamond is a very large mine, having ten levels and so large that the head fire boss could not attend to all the duties and it was necessary to have a fire boss at

every level and who did the same work on each level as he head fire boss.

Q. You must, in the nature of things, on account of the size of the mine, depend on the assistants to do some of the work that you had to do, must you not?

A. There is a fire boss on every level.

Q. And Mr. Righi was the fire boss in level No. 6.

A. He was the fire boss of the sixth level.

Q. It was his duty to keep the mine in a safe condition.

A. Well, that was his duty to see to it.

Witness excused.

Whereupon FRANK DOLL, a witness for the defendant, being sworn testified, that on the 17th day of September, 1910 he was foreman in the defendant's mine at Black Diamond. That sometime previous to that Stanley Brown applied to Mr. Christenson the superintendent for work. That Mr. Christenson sent Brown to the witness, and the witness told him to come back for the afternoon shift, and that the shot lighter Righi would put him to work. That Righi did put him to work on the afternoon shift.

Q. Did you notice his condition when he first came there to talk to you about going to work?

A. Yes.

Q. Just tell the jury how he looked, as far as appearance and weight.

A. Well, he was a young gentleman; a young man; he seemed to be a good, strong man.

Q. Did he look any different then than he does now?

A. No, I don't think he does.

Q. Was he as heavy then?

A. No.

Q. How is that?

A. No sir, he was not a heavy man.

Q. What was his condition and what was the condition of his appearance, his complexion?

A. Well he was a light complected man.

Q. Was there any difference in his complexion then than now?

A. I don't notice any.

Q. Did you notice any particular difference from his condition when you first saw him and at the present time?

A. No sir, I do not.

Q. Who sees that there is timber kept in the mine and who did on the 17th of September?

A. The shot lighter most generally does.

Q. Who is the shot lighter?

A. Righi at that time.

The witness then stated at 3:30 o'clock p. m. on the 17th day of September, 1910, there was brattice timber in chute No. 75.

Q. Whose duty is it to put up the brattice?

A. The miners'.

On cross examination the witness testified as follows:

Q. If a man wants a job he goes to the superintendent and the superintendent sends a note to the

mine foreman, such as yourself, asking if you can use the man.

A. Yes.

Q. And then you send him to the boss of the different levels to ask them if they can use the man.

A. Yes.

Q. And Mr. Righi was the man you sent Stanley to, asking him if he could use him, and it was left with Righi as to his employment and as to the different places in which he was to be sent to work, so that he was the representative of the company in employing the men that he wanted—if he could use the men he would use them, is that the fact?

A. No sir, not always. They tell me how many men they want and I tell Mr. Christenson and Mr. Christenson sends them to me.

The COURT: You are spending a good deal of time and labor on the matter of the authority of hiring and discharging men. Now, I am going to instruct the jury that that does not make a vice principal.

Mr. LEA: All right, I will cease that examination. Righi is called the shot lighter and sometimes the fire boss.

Q. Is it not his duty to manage that part of the mine, isn't that a fact?

A. Mr. Allen was the night fire boss.

Q. But that particular part of the mine, he manages it in every way and looks after the conditions of the ventilation and that miners and all that and is the sole representative of the mining company

in that particular level, isn't he—now isn't that a fact?

A. At the time he is around lighting the shots—

Q. His duties are more than just the duties of a shot lighter.

A. He sees that the coal is got out of there and one thing and another.

The witness then stated that Mr. Allen, the night boss was over Mr. Doll the foreman. Witness excused.

Whereupon WILLIAM HANN, a witness for the defendant testified that he has been a miner for twenty-eight years and is now superintendent of the defendant's mine at Black Diamond, Washington—the same mine in which Stanley Brown was injured. That this mine was considered a medium gaseous mine and in digging the coal gas escapes from the face and miners work with Wolf safety lamps. That it is the duty of the fire boss to light the shots and that there is no fixed custom about the miners going to show the fire boss where the shots are. It is not dangerous for the miner to stay in the face when the shot lighter is lighting the blast. Sometimes he will stay there and sometimes he will not.

Q. What is the custom in the Black Diamond mine after they show them the shots?

A. Well, as I say, there is no regular custom; he can either stay at the face with the shot lighter or he can immediately go down to the gangway or the crosscut as the case may be. They can do so if they wish, but it is not their duty. That after showing where the shots are they sometimes stay in the

chute until all the shots are lighted and sometimes go out. That a miner should build a brattice as soon as he has room for it—the brattice lengths being about six feet.

Q. If a miner knew that there was gas in a certain chute or breast, would you think it would be safe for him to go in there while they were lighting those shots and making an inspection for gas, knowing that there was gas there?

A. Well, I would consider any practical miner would be very foolish to go into a place while a shot was being lit or while the fire boss or shot lighter was making an inspection—it would not be necessary for him to go there at all.

Q. What is the custom where the miner tells the fire boss that there is gas in a certain chute; does the fire boss go up and make the inspection first?

A. Yes sir, the fire boss does, as a general rule. I am not saying that it is done in every case, because a man cannot tell just what goes on in every case, because as a general rule among miners the fire boss will go alone up into that place.

Upon cross examination the witness said: That the fire boss should not light a shot until he had made an inspection. for gas.

Q. The miner is supposed to obey the order of the fire boss isn't he, and if the fire boss asks him to go to the face and show him the shots, it is his duty to accompany the fire boss and to show him the shots, is it not?

A. Well, I don't know that it is necessary or that it is his duty even.

Q. If he is asked to, is it not his duty to obey the orders that are given to him?

A. Not an order of that kind. It is the duty of the fire boss to,—or the shot lighter, or the fire boss —we use both terms—it is his duty for to fire the shots and it is really not the duty of the miner to go up there with him, but he can go in there if he wants to, of course, but there is no offense if he refuses to go up there with him.

Q. He would not keep his job very long would he, if he refused to point out the shots to a fire boss.

A. Yes sir, he would keep his job. That would not be considered any offense at all against mining.

Q. It is rather difficult, in the poor illumination of a mine, to find the shots, is it not, with a lamp of that character?

A. No. They are easily found, from the fact that the fuse is hanging out from the end of the hole after the shot is already tamped and the fuse is handing out and it is very easy to find just where they are located.

Q. Is it not a fact that under the custom and under the law of mining that a man cannot go unaccompanied by another man into a place known to be gaseous?

A. I do not know of any law on that at all.

Q. Does not due care require that two persons shall go along in order that if one is injured or disabled the other may be there to help him?

A. I do not know of any practice of that kind in any of the mines in this state.

Q. You don't know of any practice of that kind?

A. I don't know of any practice of that kind, no sir—it has not been carried out that way.

Q. You would not have it understood, would you, Mr. Hann, that the ventilation of the Black Diamond is so poor that the volume of air being propelled through the mine is so insufficient, that an accumulation of gas could take place within ten feet of the brattice, would you?

A. Yes sir, I certainly would.

Q. You think that your ventilation is so insufficient that there would be an accumulation within ten feet from the brattice.

A. Yes sir.

Witness excused.

Dr. W. A. SHANNON, a witness for the defendant, being sworn, qualified as a practising physician and surgeon and said he had been practising in Seattle for 23 years and altogether about 25 years. He said that in October, 1910, Stanley Brown, accompanied by Mr. Lea and Mr. Greene called on him at his office in Seattle and that he made a thorough examination of Brown at that time, and found that he had been burned on the face, the side and arms, and that the burns had healed leaving superficial scars at that time. Brown complained of a pain in his side and told the witness that he had a fractured rib. The witness examined him but did not find any indications of a fractured rib or any pleurisy conditions or adhesions of any kind; and did not see Brown spit blood or see anything that would cause Brown to do so or that would disable him for work. But Brown complained that he had

been spitting blood. That if a man spit blood for nine months after an injury that he would consider it was not due from that injury but some other cause because the lung would heal by that time, and in his opinion a broken rib would be healed after five weeks.

Upon cross examination witness testified:

Q. (Mr. LEA) You say you do not remember that his complexion was any different then from now, although you are not sure?

A. I am not sure.

Q. Don't you know that every part of his face that was exposed was a red mass, bloody and even festering at that time and you could not see his skin and could not tell his complexion?

A. You are mistaken about his condition.

Witness testified that he made the usual examination which consisted of the use of a stethoscope, thumping and feeling with the hands, and that after a lapse of such a time he might not find anything at all.

Q. You might not find anything at all, so that you would not give it as your opinion then that the man's rib was not broken?

A. No.

Q. It might have been broken for all you know?

A. Yes it might.

Q. There might also be a shock, even if a rib was not broken which would often rupture the lung, might there not?

A. Yes/

Q. And also cause pleurisy?

A. Yes.

Q. If there is an inflammation set up inside, you would expect to have adhesions, would you not?

A. Do you mean subsequent—afterwards?

Q. Afterwards, on account of the inflammation and the raw character of it, that they would grow together.

A. Likely I would.

Q. How could you discover that there are adhesions?

A. You could not discover that.

Q. You cannot say whether that a man had or did not have adhesions with certainty.

A. No.

Q. And you could not say that Stanley Brown did not have adhesions?

A. No.

Witness expressed his opinion that he would not expect a person to spit blood for nine months after an injury and that if the person did so he would consider it caused by some other trouble or some more recent trouble.

Q. You could not say then, doctor, in your professional opinion, that Stanley Brown at that time and now is suffering from adhesions, that he had a broken rib, that his lungs were injured from the blow.

A. No, I could not say that his rib was not fractured.

Q. And the pain in his side would indicate those particular troubles, wouldn't they?

A. Yes.

On direct examination witness stated that he was at that time surgeon for the miners' hospital association at Black Diamond and for the Miners' Union and was not working for the company then, but in making the examination he acted at the request of Mr. Greene for benefit of defendant.

Wtiness excused.

Dr. J. C. BOYLE was then called as a witness for the defendant.

Objection was made by the plaintiff to misconduct in calling the plaintiff's physician to testify without first obtaining the consent of the patient, and exception was taken to such misconduct that caused the plaintiff to choose between exercising his privilege of excluding the testimony on the ground of confidential communications or allowing the jury to draw a wrong conclusion, from the exercise of this right. The Court then instructed the witness that he did not have to testify as to matters arising out of the relation of physician and patient, whereupon said witness being duly sworn qualified as a physician and surgeon and stated that he was in the employ of the Hospital Board at Black Diamond, which is made of up of five members; three from the Miner's Union and two from the defendant company. That he and Dr. McCormack treated plaintiff beginning September 17th, 1910; that plaintiff was brought to the hospital suffering from burns and he was given the oil treatment; that he was suffering from shock and burns on his face, arms and shoulder, and he treated him for perhaps two or three weeks, when he left the camp and he saw

him once after than ten days after he left the camp; at such time the burns were practically healed with the exception of a few superficial scars; that witness did not find any other injuries than the burns; that he made no examination to see if a rib had been broken and did not see him spitting blood, nor did he know of any complaint of that character; that his bowels troubled him considerably, however. That plaintiff is perhaps a little thinner now than he was at that time. That plaintiff was not discharged from the hospital but that he left with a friend of his own accord; that witness did not discharge him or tell him he was fully cured. On cross examination the witness stated that reports were made to the company of the nature of the injuries and reports have been made to the company at all times since, without consulting with the patient.

Q. You were treating him—are you not aware of the fact that a doctor cannot disclose to anybody what he finds upon a patient or what a patient says to him—what right did you have to disclose to the Pacific Coast Coal Company his condition?

A. Why, it was necessary that we should do it.

The WITNESS: It was one of the rules, to report all injuries. Witness then testified that it was one of the rules of the company that a patient could not leave Black Diamond without the consent of the association and also of the doctor; that the plaintiff left without this consent and for that reason they refused to give him further treatment.

Q. As a matter of fact, because Stanley left town to consult with a lawyer, didn't you report to this benefit association, and wasn't the measly fifty cents a day withdrawn from him?

A. That is the rule.

Q. And that was done in this case?

A. I think it was, yes sir.

Q. Did you treat him after he came back to Black Diamond?

A. We didn't have occasion to—he didn't present himself.

Q. You did not make any examination for a broken rib?

A. No sir.

Q. You do not know whether he had a broken rib or not?

A. No sir.

Q. And a man might suffer from a broken rib without you being aware of such a fact?

A. Well, I think so, but he would give evidence himself of a broken rib.

Q. The evidence of a broken rib is pain.

A. Yes.

Q. And when he complained of pain, having a burn on the side, you told him it was the burn, didn't you?

A. Yes sir.

Q. You expected it was the burn and you told him that pain was caused by a burn—now if a competent doctor thereafter made an examination and found the broken rib, you would not say that doctor

was not telling the truth when he said it was a broken rib?

A. No sir.

Q. You would not say that doctor was not telling the truth when he found a laceration of the lungs and of the pleura would you—you made no examination for such fact?

A. We made no such examination.

Witness was excused.

IGNISH RIGHI, witness for the defendant being sworn, testified that he is now a timber man working in the Black Diamond mine; that he has been working as a coal miner for over seven years and was fire boss for three years in Black Diamond. That at the time Brown was injured Frank Doll was inside foreman.

Q. What were your duties as a fire boss on the 17th of September, when Stanley Brown was injured what were you doing?

A. Well, I was keeping charge of the mine and examining all the places when I was going around.

Fifty men were working under witness at that time; that he had made two rounds that evening in chute No. 75, the first time about 6 p. m. but had fired no shots as none had been prepared; that two brattice were up; that at that time the brattice examined were from 15 to 18 feet from the face; that the brattice is supposed to be kept within five or six feet feet of the face. that there was plenty of timber in the manway to build more brattice.

Q. When you went in there at 6 o'clock did you notice any gas there?

A. There was no gas then.

Q. Was it your duty to inspect for gas?

A. It was my duty all the time to examine the mine.

.Q How did you inspect for it—did you inspect for gas at 6 o'clock when you went in?

A. Yes.

Witness then testified that he came back to chute No. 75 at about 9:30 P. M. and found Brown and his partner in crosscut at lunch. Witness asked them if they had any shots ready and they said they had three.

Q. What did you do?

A. Well, I told them to go up and show me those shots.

Q. Did he go up there with you?

A. He came up, and his partner stayed in the crosscut.

Q. Did his partner go with you?

A. No sir; I didn't see his partner up there.

Q. Did he show you the shots?

A. Mr. Brown, yes.

Q. And how many shots were there there?

A. Three shots.

Q. What did you do to them, did you light any of them?

A. I lighted three fuses and I started from the first one.

Q. You lit the three?

A. Yes sir.

Q. Did you make an inspection for gas when you first went up?

A. Yes sir.

Q. Did Brown stay there with you?

A. He stayed there behind me about eight or ten feet from the end of the brattice.

Q. What is the custom when a man goes in there to show you where the shots are, does he stay there or go out?

A. Well, he goes to the end of the brattice and he says "There is one; and there is another" so that a man can see it, because with the Davy lamp you can't see as well as you can with the Wolf lamp.

Witness then testified that it was the custom for the miners to show the fire boss the shots and they then go out when the fire boss tells them he is ready to shoot them and the fire boss would do this by yelling "fire"; that all this was done that evening; that the explosion took place in lighting the third fuse, the fuse lighting the gas in the hole and it lit a little gas in the top of the roof. Witness then explained that he lighted the shots by inserting a wire into the lamp which became red with heat and he then touched this to his touch paper, which in turn he touched to the fuse. That sometimes the touch paper is damp and it takes some time to light it.

Q. What was it that caused the gas to explode—what made the gas explode—what was it that did that?

A. In the last hole it was full of gas and the spit of this fuse lit this gas in the hole and this flame of this gas was long enough so that it reached this gas in the roof.

Upon cross examination witness testified that the three holes were located about the same distance from the top and that the holes were located differently at different times, according to the formation and character of the work; that it is necessary for a certain shot to be fired first under certain conditions which did not exist at this time.

Q. (Mr. LEA) On account of the different ways in which the holes are drilled by the miners, is it not necessary for a miner to point out to you which shot is the shot to be fired first?

(Objection by Mr. Farrell.)

Q. I want to know whether you know enough to go and fire shots without having to be told where they are.

A. They must come up there and show me, because the fire boss dosn't know which to fire first or which to—

Q. (Interrupting) They must show you which shot to fire first.

A. Yes.

Q. And the miner is compelled to go with you to show you which shots are to be fired and which order they are to be fired in.

A. They have to tell me which one is to go first.

Q. Now, when the miner comes to show you those shots he shows you the shot to be fired first that he has drilled for the purpose of being what I call a buster-shot—he shows you that.

A. He must tell me if the holes are all the same length before I can fire the fuse.

Q. And as he shows you one fuse you light that fuse, don't you?

A. The three of them I light.

Q. Doesn't he show you the first fuse and don't you light that first?

A. I ask him which one is the longest hole and they tell me to light the lower one first.

Q. Now did you make a test for gas there at that time?

A. I examined the place, as I said before.

Q. Did you find any gas?

A. Well, when I lit the shot I did not find any gas.

Q. Did you test for gas immediately before making this shot?

A. I examined the place.

Q. For gas?

A. Well, when I say I examine a place I mean everything.

Q. You mean a test with the Davy lamp.

A. The Davy lamp.

Q. That lamp is a different lamp than the miners use?

A. Yes sir.

Q. The miners use the Wolf lamp, which gives more light, while the Davy lamp does not give so much light, but with using a different quality of oil, as the gas tester uses it, it is more sensitive to gas—you can discover gas much more easily than the miner with the Wolf lamp.

A. It is more safe.

Q. Did you find any gas in that breast just before firing those shots.

A. Not when I examined it.

Q. Did you examine the roof?

A. I never examined the bottom, I always examine the roof.

Q. Did you examine the roof on that particular occasion?

A. All the time.

Q. And you didn't find any gas?

A. Not at the time.

Witness then testified that no mining was done after his arrival at the place; that the holes were already tamped. That he examined the place.

Q. Did you find the place safe at the time you shot these shots?

A. I say that again I examined the place.

Q. In your opinion it was in a safe condition to discharge those shots?

A. Yes sir, in my opinion it was safe.

Q. At that time did you know that the brattice was twenty feet from the face?

A. I never said twenty feet—I said fifteen feet from the face..

Q. Did you know it was fifteen feet from the face at the time you discharged those shots?

A. At the time I discharged those shots?

Q. Yes.

A. To the face of the mine was about fifteen or eighteen feet.

Q. You knew that at the time?

A. Yes.

Q. And in your opinion it was safe.

A. In my opinion—every fire boss' opinion.

Q. Did you tell the boys it was safe and all right?

A. I didn't need to tell the boys it was safe—when I was right there to fire I told them I was going to fire.

Witness then testified that when he was ready to fire the first fuse he called "fire" and the miners were supposed to go to a safe place. That he did not look to see if they had gone or not, and they are not supposed to leave until "fire" is called. Witness then stated that the holes were plugged with clay.

Q. And that was the condition at this time and the gas does not come through the clay, does it?

A. It might not go through there, but it can come outside of that.

Q. If it is plugged with clay the gas would not come through the clay.

A. It won't come through the clay but it can come out of that.

Witness excused.

AL FILLINGHAM, a witness for the defendant being sworn, testified that on the 17th day of September 1910, he was a shot lighter in the employ of the Pacific Coast Coal Company at Black Diamond; that on the Monday morning following Brown's injury he went into chute 75 to test for gas; he stated there was no change since Brown was injured; that he saw brattice timbers in the manway and that the brattice was fourteen to sixteen feet from the face at that time; that two lengths of

brattice were then standing. Upon cross examination, witness testified that at the time he examined breast No. 75 after the explosion the brattice was about fourteen to sixteen feet from the face; that he knew nothing of the character of the shots that had exploded, but that coal, after shots, usually breaks down a number of feet, depending upon how the holes were placed; witness would not state that it was exceptional to break down as much as seven feet. Witness did not know whether the mine was in the same condition then as after the explosion, and for all he knew the timbers might have been taken in before he saw the place. Whereupon the defendant rested and the plaintiff did likewise, the counsel for the defendant makes the following motion to the court:

"Mr. PADDEN: If the Court please, at this time the defendant moved the Court upon the grounds stated in the motion for a nonsuit heretofore made, that the court direct the jury to return a verdict at this time for the defendant, and especially upon the grounds that the case shows that the plaintiff was guilty of gross contributory negligence.

The COURT: The Court denies the motion. You can have an exception.

(Exception noted for defendant.)

(Whereupon the cause being argued by counsel for both sides to the jury, the court instructs the jury as follows:)

INSTRUCTIONS BY THE COURT TO THE JURY.

The COURT: Gentlemen of the jury: The ground on which an injured person has a right to compensation from his employer for his injuries received in the course of the employment is the neglect of the employer to perform the duty which an employer owes to employees to make the employment reasonably safe as to the place where the work is to be done and as to all tools and appliances and surroundings the employer is obligated towards his employees to observe the same degree of care for their safety that persons of ordinary prudence habitually exercise for their own safety.

This action is founded upon that principle.

The plaintiff was hurt while at work. There is no controversy about that. His action is against his employer, and the question of whether he has a right to recover depends upon whether you find from the evidence that the employer neglected the duty of making the place where he was employed and the conditions there reasonably safe.

As to the general operation of a mine, the maintenance there of a suitable ventilation system, the provision of suitable timber for making the brattice to conduct the air through the system, and the duty of inspection to keep the place in a condition of safety, the employer's obligation is that of an ordinarily prudent person in the exercise of care for his own safety.

The jury are the exclusive judges of the questions of fact in the case. You are to determine from a

consideration of the evidence what the testimony proves, and decide the case accordingly.

The plaintiff has the burden of proof on his part to establish his case, to prove what he alleges in his complaint as to the particular breach of duty on the part of the employer, and to sustain that burden, to prove the case legally, there must be at least a fair preponderance of the evidence on his part to prove affirmatively what he has alleged in his complaint.

There is not only the general obligation based upon the common law which is based on the general principles of right and wrong, that the employer shall observe due care for the safety of the employees, but there is in this state a positive law, a statute law which applies to coal mines.

You are instructed that the law requires that the law requires that every owner, agent or operator of any coal mine, whether operated by shaft, slopes or drifts, shall provide in such coal mine a good and sufficient amount of ventilation for such persons as may be employed therein.

The object of this statute is to provide a reasonably safe place for miners to work in coal mines, and it is the duty of the owner, operator or agent of the coal mine to furnish to its miners a reasonably safe place in which to work.

Now, if there was any neglect on the part of the defendant corporation to provide for the ventilation of the mine in which the plaintiff was at work that is a breach of legal obligation which creates a legal liability to render compensation for the in-

jury suffered. That is an obligation which rests upon the employer to the extent that it cannot be delegated to some one else. I mean by that the employer cannot say "I appointed my superintendent or my foreman to attend to that and the failure to provide suitable ventilation is the failure of an employee—a fellow employee with the plaintiff." The employer is not allowed to make that defense in regard to that particular duty and obligation. Whoever was placed in the position to see to the ventilation was the representative of the defendant corporation, and for the purpose of deciding the case is to be considered as the principal in the matter.

You are instructed that the law requires that the owner, agent or operator of a coal mine must furnish not only a reasonably safe place in which to work, but also safe appliances, and this includes the timber required with which to provide and maintain a good and sufficient ventilation to carry out dangerous gases.

You are instructed that the duty of inspection, prevention and removal of any accumulation of gas is imposed on the Coal Company. This duty is personal and cannot be delegated, and any person who for the Company was engaged in an employment having as part of his duties the duty of inspection, prevention and removal of any accumulation of gas is not a fellow servant of a coal miner with respect to the performance of that duty.

Now, a man may be a fellow servant in the general operations of the coal mine but wherever he is

charged with the employer's specific duty of providing for ventilation and suitable means for making the operation of the mine safe, he is not a fellow servant in the performance of those duties.

A coal company employing such person would be responsible for all damages caused by reason of negligence in the performance of his duties in the prevention, inspection and removal of any accumulation of gas.

You are instructed that an employee of a coal company one of whose duties it is to test for gas in a coal mine is not a fellow servant with a coal miner so far as he is engaged in the performance of such duty.

In some cases the employer is liable for neglect of duty, and there is also negligence or contributory negligence on the part of a fellow servant of the injured one, but where the employer is liable by reason of negligence that is not due to a mere act of negligence of a fellow servant the concurring or contributory negligence of a fellow servant does not relieve the employer of liability.

The defendant in its answer has interposed special affirmative defenses. One is that the plaintiff's injury was caused by his own negligence. If both parties were guilty of negligence, the defendant in some respects and the plaintiff in other respects—if he was guilty of contributory negligence or concurring negligence which was a cause of his injury, then he is barred from any recovery. The law does not divide the responsibility, but where an injured party suing for damages is shown to have been

guilty of such acts or neglect as were contributing causes to his injury he is barred from any right of recovery at all.

The second affirmative defense is that the injury was caused by the negligence of a fellow servant of the plaintiff. The rule in regard to that is that the employer is not liable to his employees for injuries suffered by negligent acts on the part of their co-employees engaged in the same common employment. It will be necessary for the jury to determine what was the cause of this particular injury. If it was entirely due to the careless or negligent act of a co-employee of the plaintiff, then this defense is made out and the plaintiff cannot recover. If, however, the accident could not have happened except for something else besides the negligence of the co-employee—if there was negligence making the defendant liable and that was the cause or one of the causes of the plaintiff's injury, then the neglect of the fellow servant would not constitute a defense. It is only where the neglect of the fellow servant is the sole cause that this defense is available or legal.

Now, the third defense is what is called assumption of risk. The rule on that subject is that a man who voluntarily accepts employment is, by the terms of his contract, charged with the responsibility for such injuries as may happen to him in the course of the employment by reason of incidental hazards of that particular employment. A man who goes to work in a coal mine voluntarily assumes the ordinary and necessary risks of working in a coal

mine, the same as a man who goes to sea in a ship as a sailor or engages in any other employment. Those things which are usual and incident to that particular employment are not to be compensated for by the employer where there is not a failure on the part of the employer to observe due care.

The risks assumed by an employee are those which are usually and necessarily incident to that line of work and also such other particular dangers as exist and are known to him, and such other particular dangers as exist and are so obvious that they should be known to a man who is vigilant and alert for his own safety.

An employee is required to exercise due care for his own safety the same as the employer is required to exercise ordinary care for the safety of the employees, and particular risks or hazards which at any particular time are obvious and are known or would be known to a man who is exercising his senses, are excepted from those risks of employment which render the employer liable.

Now, as to each of these three affirmative defenses, that is contributory negligence, negligence of a fellow servant and assumption of risks, the burden of proof is on the defendant who has alleged those things to prove one or either of them, or one or all of them, by at least a fair preponderance of the evidence. That is, by the rule that the party that has the affirmative side of an issue must make out his case by evidence sufficient to outweigh all the evidence to the contrary.

The jury in determining the facts will understand that they are to exercise their intelligence and their knowledge of human nature gained by experience in the affairs of life in judging of the weight and value of the testimony. You have the right to scan the witnesses and determine whether their evidence is of the kind that is convincing and creates a belief in your minds, taking into account the situation of the witnesses who have testified, as to whether they have any interest which might influence them to give a color to their testimony. You will judge of them by the opportunities which they had for becoming cognizant of the facts which they testify about and their ability to remember and to restate and state in words so as to inform you intelligently of what the facts are concerning which their testimony relates and any other fact or circumstance which might have a tendency to strengthen, corroborate or to impeach the testimony of the witnesses, you have the right to take into account. You are expected to treat the witnesses fairly and judge of their testimony candidly and decide the case according to the testimony as it appears to you, in the same way that you would determine a question of like importance in your own affairs.

It requires the unanimous concurrence of the jury to find a verdict for either side. If your verdict is for the plaintiff it would be necessary for you to determine the amount of damages which should be awarded to him as compensation for his injuries. He is entitled to be reimbursed for any outlay inci-

dent to his injury and his cure that the evidence shows he may have incurred; he is entitled to have made up to him the loss of wages during the time he was incapacitated and what in the estimation of the jury would be reasonable compensation for his pain and suffering. The loss of wages of earning capacity the jury have the right to take into account—whatever he may have lost up to the time that he appears to have been able to go to work again. I am not telling you that he is entitled to this or to anything, but that is the basis on which you are to estimate the damages to be awarded him if you decide that he is entitled to recover.

There is another form of verdict here to be signed by your foreman in case the jury should decide to render a verdict in favor of the defendant.

DEFENDANT'S EXCEPTIONS TO THE COURT'S INSTRUCTIONS TO THE JURY.

Mr. PADDEN: If your honor please, the defendant at this time desires to enter an exception to the instructions given by the court to the jury relative to the duty of inspection and taking care of the mine being non-delagable and which instructions were as follows:

1. "Now if there was any neglect on the part of the defendant corporation to provide for the ventilation of the mine in which the plaintiff was at work that is a breach of legal obligation which creates a legal liability to render compensation for the injury suffered. That is an obligation which rests upon the employer to the extent that it cannot be delegated to some one else. I mean by that the employer cannot say 'I appoint my superin-

tendent or my foreman to attend to that and the failure to provide suitable ventilation is the failure of an employee—a fellow employee with the plaintiff'. The employer is not allowed to make that defense in regard to that particular duty and obligation. Whoever was placed in the position to see to the ventilation was the representative of the defendant corporation, and for the purpose of deciding the case is to be considered as the principal in the matter.

2. You are instructed that the law requires that the owner, agent or operator of a coal mine must furnish not only a reasonably safe place in which to work, but also safe appliances, and this includes the timber required with which to provide and maintain a good and sufficient ventilation to carry out dangerous gases.

3. You are instructed that the duty of inspection, prevention and removal of any accumulation of gas is imposed on the Coal Company. This duty is personal and cannot be delegated, and any person who for the Company was engaged in an employment having as part of his duties the duty of inspection, prevention and removal of any accumulation of gas is not a fellow servant of a coal miner with respect to the performance of that duty.

4. Now, a man may be a fellow servant in the general operations of the coal mine but wherever he is charged with the employer's specific duty of providing for ventilation and suitable means for making the operation of the mine safe, he is not a fellow servant in the performance of those duties.

A coal company employing such person would be responsible for all damages caused by reason of negligence in the performance of his duties in the prevention, inspection and removal of any accumulation of gas.

You are instructed that an employee of a coal company one of whose duties it is to test for gas in a coal mine is not a fellow servant with the coal miner so far as he is engaged in the performance of such duty."

ORDER SETTLING AND CERTIFYING BILL OF EXCEPTIONS.

The matter of settling and certifying the foregoing Bill of Exceptions came on regularly to be heard this 14th day of April 1913, and it appearing to the court that this court did on the 4th day of November, 1912, stay execution in this cause, and extend the time for ruling upon the defendant's motion for a new trial, from the May term of this court until the November term thereof, and did extend the time for filing amendments to the proposed bill of exceptions herein and for settling, certifying and filing of the bill of exceptions herein until and into the November term of this court and until and after the ruling on said motion for a new trial, and that by agreement of the parties and the order of the court this time and date within said November term has been fixed for the settlement, certifying and filing of said bill of exceptions; and it further appearing to this court that the Honorable C. H. Hanford who presided at the trial of said cause, and the Honorable C. W. Howard, who passed upon the motion for new trial therein, have both resigned from this court before the bill of exceptions herein could be settled; and it further appearing that the defendant has caused to be prepared from the notes taken by the court stenographer who was present and in attendance upon said trial, a full, true and correct transcript of all the evidence, testimony and proceedings of said trial, which transcript the parties hereto agree is a full, true and correct trans-

cript of all the evidence introduced at and all proceedings had at the trial herein, and which said transcript the court has now before it, and the contents of which it is fully advised; the plaintiff and defendant now appearing by their respective attorneys of record herein and both agreeing to the settlement of the foregoing as bill of exceptions herein, and this court having found the foregoing, together with a diagram marked plaintiff's exhibit "A", to be and to compose all the testimony, facts, evidence and proceedings had or given at the trial herein.

Now therefore, it is by the undersigned Judge of this court Ordered and Certified that the foregoing be and the same is hereby settled as the true bill of exceptions in said cause, and that said bill of exceptions, together with plaintiff's exhibit "A", includes all of the facts, evidence, testimony and proceedings introduced or had at said trial herein, and that the same is correct in all respects and is hereby allowed and settled and made a part of the record herein and the same being so settled and certified, it is hereby Ordered to be filed by the Clerk.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Bill of Exceptions and Order Settling the same. Filed in the U. S. District Court, Western Dist. of Washington, Apr. 14 1913. Frank L. Crosby, Clerk. By E M L. Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1978.

STANLEY BROWN,

Plaintiff,

vs.

PACIFIC COAST COAL COMPANY,

Defendant.

ASSIGNMENT OF ERRORS.

Comes now the Pacific Coast Coal Company, defendant and plaintiff in error in the above entitled and numbered cause and in connection with its petition for Writ of Error in this cause assigns the following reasons, which the defendant and plaintiff in error avers occurred on the trial thereof and upon which it relies to reverse the judgment entered herein as appears of record:

I.

The court erred in denying defendant's Motion to Dismiss made by counsel for the defendant at the close of the statement of plaintiff's case made by counsel for the plaintiff for the reason:

1. That by said statement it was admitted and affirmatively appeared that plaintiff was guilty of negligence which was the proximate cause of and which contributed to his alleged injuries.

2. That in said statement it was admitted and affirmatively appeared that the plaintiff's alleged injuries were due to and proximately caused by acts and conditions the risks and hazards of which he

assumed upon entering into the employment of the defendant and by remaining in said employment, and especially by remaining in the place where he was alleged to have been injured at the time of his alleged injuries.

3. That by said statement it was admitted and affirmatively appeared therefrom that the alleged injuries of the plaintiff were due to and proximately caused by the act of a fellow servant engaged in the same common employment with the plaintiff.

4. Because in said statement there was a failure to charge the defendant with any negligence which was the proximate cause of plaintiff's alleged injury.

II.

The court erred in denying defendant's Motion to Dismiss and for a non-suit made at the close of plaintiff's testimony, the substance of which Motion was as follows:

"Mr. PADDEN: If your honor please, at this time the defendant moves the court that a non-suit be granted in this case and the defendant moves the court to dismiss this case and to take it away from the jury for the reason that the plaintiff has failed to prove a cause of action, for the reason that the evidence shows that the plaintiff has not a cause of action, for the reason that the evidence shows that the plaintiff assumed the risk; for the reason that the evidence introduced by the plaintiff shows that the injury, if any, was caused by the negligence of a fellow servant of the plaintiff; for the further reason that the evidence shows that the plaintiff has been guilty of contributory negligence.

(Whereupon counsel for defendant argues his motion at length to the court and cities authorities in support thereof.)

The COURT: I cannot indulge you in reading a multitude of cases to the court, for these negligence trials never would end if I let one side read all the cases they can bring and the other side bring all the other cases they want to read. Negligence has gone into such a mass of matter in the law books, that for every one you read your adversary can produce others, so that you cannot settle anything by reading the cases. The elementary principles of law have got to be applied and each case has got to be decided on its own merits.

I deem it expedient for you to try this case out and get the verdict of the jury on it. Taking the Summers case which you read from as a guide, it is not probable that the granting of this motion would end this litigation, because if the Court of Appeals should do in this case as they did in the Summers case they would send it back here and require the case to be submitted to a jury. I do not wish to make any comments further. The jury have to take the responsibility of deciding what the facts are from the evidence and apply the law as given by the court to those facts and decide the case. I want the jury to understand now that in denying this motion I am not deciding that the plaintiff has made out a case entitling him to damages. I am simply passing that question on for the jury to decide.

Proceed with the case.

(Exception noted and allowed to the defendant.)

1. For the reason that the evidence of the plaintiff failed to show any negligence on the part of the defendant which was the proximate cause of the plaintiff's alleged injury.

2. For the reason that it affirmatively appeared from said evidence that the alleged injuries were due to and proximately caused by acts, omissions and conditions, the risks and hazards of which the plaintiff assumed upon entering into the employ-

ment of the defendant and by remaining therein, and especially by remaining in the place where he was alleged to have been injured at the time of his alleged injuries.

3. Because from said evidence it affirmatively appeared that the alleged injuries of the plaintiff were due to and proximately caused by the acts of a fellow servant engaged in the same common employment with the plaintiff.

4. Because from said evidence it affirmatively appeared that the plaintiff was guilty of negligence which was the proximate cause of and which directly contributed to his alleged injuries.

III.

The Court erred in denying defendant's Motion to Dismiss and to direct a verdict in favor of the defendant made at the close of all the evidence, which Motion was as follows:

Mr. PADDEN.—If the court please, at this time the defendant moves the court upon the grounds stated in the motion for a non-suit heretofore made, that the court direct the jury to return a verdict at this time for the defendant, and especially upon the grounds that the case shows that the plaintiff was guilty of gross contributory negligence.

The COURT.—The Court denies the motion. You can have an exception.

(Exception noted for defendant).

1. For the reason that by all the evidence introduced in the case the plaintiff failed to show any negligence on the part of the defendant which was the proximate cause of plaintiff's alleged injuries.

2. For the reason that by all the evidence in the case it affirmatively appeared that the alleged

injuries were due to and proximately caused by acts, omissions and conditions, the risks and hazards of which the plaintiff assumed upon entering into the employment of the defendant and by remaining therein, and especially by remaining in the place where he was alleged to have been injured at the time of his alleged injuries.

3. For the reason that by all the evidence in the case it affirmatively appeared that the alleged injuries of the plaintiff were due to and proximately caused by the acts of a fellow servant engaged in the same common employment with the plaintiff.

4. For the reason that by all the evidence in the case it affirmatively appeared that the plaintiff was guilty of negligence which was the proximate cause of and which directly contributed to his alleged injuries.

IV.

The Court erred in overruling defendant's Motion for Judgment Notwithstanding the Verdict:

1. For the reason that by all the evidence introduced in the case the plaintiff failed to show any negligence on the part of the defendant which was the proximate cause of plaintiff's alleged injuries.

2. For the reason that by all the evidence in the case it affirmatively appeared that the alleged injuries were due to and proximately caused by acts, omissions and conditions, the risks and hazards of which the plaintiff assumed upon entering into the employment of the defendant and by remaining therein, and especially by remaining in the place

where he was alleged to have been injured at the time of his alleged injuries.

3. For the reason that by all the evidence in the case it affirmatively appeared that the alleged injuries of the plaintiff were due to and proximately caused by the acts of a fellow servant engaged in the same common employment with the plaintiff.

4. For the reason that by all the evidence in the case it affirmatively aappeared that the plaintiff was guilty of negligence which was the proximate cause of and which directly contributed to his alleged injuries.

V.

The Court erred in entering judgment in favor of the plaintiff for the sum of four thousand dollars ($4000.00) together with interest thereon from May 10, 1910 and for his costs and disbursements for the reason that said judgment is unjust and erroneous:

1. Because there was insufficient evidence to support or justify the verdict rendered in said cause and upon which said judgment is based.

2. Because the evidence upon the trial of said cause was insufficient to establish any negligence on the part of the defendant.

3. Because by all the evdience in the case it affirmatively appeared that the alleged injuries were due to and proximately caused by acts, omissions and conditions, the risks and hazards of which the plaintiff assumed upon entering into the employment of the defendant and by remaining there-

in, and especially by remaining in the place where he was alleged to have been injured at the time of his alleged injury.

4. Because by all the evidence in the case it affirmatively appeared that the alleged injuries of the plaintiff were due to and proximately caused by the acts of a fellow servant engaged in the same common employment with the plaintiff.

5. Because by all the evidence in the case it affirmatively appeared that the plaintiff was guilty of negligence which was the proximate cause of and which directly contributed to his alleged injuries.

VI.

The Court erred in overruling and denying defendant's petition for a new trial:

1. For the reason that by said petition and affidavits filed in support thereof it was affirmatively shown that the defendant has obtained subsequent to the trial newly discovered evidence which was material to its defense, and which should have been submitted to a jury determining the issues in the above entitled action.

2. For the reason that the damages awarded the plaintiff by the jury were excessive and were given under the influence of passion and prejudice.

VII.

The Court erred in giving each of the following instructions to the jury over the objection of the defendant:

1. Now if there was any neglect on the part of the defendant corporation to provide for the ventilation of the mine in which the plaintiff was at work that is a breach of legal obligation which creates a legal liability to render compensation for the injury suffered. That is an obligation which rests upon the employer to the extent that it cannot be delegated to some one else. I mean by that the employer cannot say "I appoint my superintendent or my foreman to attend to that and the failure to provide suitable ventilation is the failure of an employee—a fellow employee with the plaintiff." The employer is not allowed to make that defense in regard to that particular duty and obligation. Whoever was placed in the position to see to the ventilation was the representative of the defendant corporation, and for the purpose of deciding the case is to be considered as the principal in the matter.

2. You are instructed that the law requires that the owner, agent or operator of a coal mine must furnish not only a reasonably safe place in which to work, but also safe appliances, and this includes the timber required with which to provide and maintain a good and sufficient ventilation to carry out dangerous gases.

3. You are instructed that the duty of inspection, prevention and removal of any accumulation of gas is imposed on the Coal Company. This duty is personal and cannot be delegated, and any person who for the Company was engaged in an employment having as part of his duties the duty of inspection, prevention and removal of any accumulation of gas is not a fellow servant of a coal miner with respect to the performance of that duty.

4. Now, a man may be a fellow servant in the general operations of the coal mine but wherever he is charged with the employer's specific duty of providing for ventilation and suitable means for making the operation of the mine safe, he is not a fellow servant in the performance of those duties.

A coal company employing such person would be responsible for all damages caused by reason of

negligence in the performance of his duties in the prevention, inspection and removal of any accumulation of gas.

You are instructed that an employee of a coal company one of whose duties it is to test for gas in a coal mine is not a fellow servant with the coal miner so far as he is engaged in the performance of such duty.

VIII.

The Court erred in denying the defendant's motion to strike certain testimony of the plaintiff, which testimony and motion were as follows:

"A. Yes sir, from the top. But I know I had a chance to build a brattice before, and I asked Mr. Righi about timbers and planks and he said "All right," I will get them up" and tomorrow or the next day I ask him the same thing and he says "Just all right, you get it", but that "all right" never be.

Q. Did he bring you the timbers?

A. I never see before I get hurt.

Mr. FARRELL.—We object to that and move to strike out the answer. There is no complaint that there was not brattice or timbers.

The COURT.—The objection is overruled.

(Exception noted for defendant)."

Wherefore the defendant and plaintiff in error prays that the judgment of said Court be reversed and that the District Court be directed to dismiss said case as prayed in the answer therein, and for

such other and further relief as to this Court may seem just and proper.

FARRELL, KANE & STRATTON,

Attorneys for Defendant and Plaintiff in Error.

Filed this 15th day of April, A. D. 1913.

FRANK L. CROSBY,

Clerk of the United States District Court for the Western District of Washington, Northern Division.

I hereby acknowledge due and correct service of the foregoing Assignment of Errors this 15th day of April, 1913.

H. R. LEA,

Attorney for Plaintiff and Defendant in Error.

[Endorsed]: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, April 15, 1913. Frank L. Crosby, Clerk. By Ed. M. Laken, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1978

STANLEY BROWN,

Plaintiff,

vs.

PACIFIC COAST COAL COMPANY, a corporation,

Defendant.

PETITION FOR ORDER ALLOWING WRIT OF ERROR.

To the Honorable

Judge of the District Court aforesaid:

Now comes the Pacific Coast Coal Company, a corporation defendant in the above entitled action, by its attorneys, and respectfully shows that on the 29th day of May 1912 a jury duly empaneled in the above entitled court found a verdict against said Pacific Coast Coal Company and in favor of Stanley Brown, the plaintiff herein, in the sum of Four Thousand Dollars ($4,000.) and upon said verdict a final judgment was entered on the 24th day of February 1913 for the sum of $4,000.00 together with interest thereon from May 29th 1912 and for the plaintiff's costs and disbursements, against the Pacific Coast Coal Company.

Your petitioner, Pacific Coast Coal Company, feeling itself aggrieved by said verdict and judgment entered thereon, in which judgment and verdict and the proceedings leading up to the same certain errors were committed to the prejudice of the said defendant, which more fully appear from the assignment of errors which is filed herewith, comes now and prays said court for an order allowing the said defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors complained of, under and according to the laws of the United States in that behalf made and provided; and that a writ of error do issue

that an appeal in this behalf to said United States Circuit Court of Appeals aforesaid sitting at San Francisco California in said circuit for the correction of the errors complained of and herewith assigned, be allowed; and also prays that an order be made fixing the amount of security, and the supersedeas bond, which the said defendant shall give upon said writ of error, and that upon the furnishing of said security and supersedeas bond all further proceedings in this cause be suspended and stayed until the determination of said writ of error by said Circuit Court of Appeals for the Ninth Circuit and the defendant further prays that a transcript of the record proceedings and papers in this cause duly authenticated, may be sent to the said Circuit Court of Appeals, and your petitioner will ever pray.

Dated the 15th day of April, 1913.

FARRELL, KANE & STRATTON,

Attorneys for Defendant.

Copy of within petition received and due service of same acknowledged this 15th day of April, 1913.

H. R. LEA,

Attorney for Plaintiff.

[Endorsed]: Petition for Order Allowing Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Apr. 15, 1913. Frank L. Crosby, Clerk. By Ed. M. Laken, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1978

STANLEY BROWN,

Plaintiff,

vs.

PACIFIC COAST COAL COMPANY, a corporation,

Defendant.

ORDER GRANTING WRIT OF ERROR AND FIXING AMOUNT OF BOND.

This cause coming on this day to be heard in the court room of said court in the City of Tacoma, Washington, upon the petition of the defendant, Pacific Coast Coal Company, a corporation, herein filed praying the allowance of a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, together with the assignment of errors, also herein filed, in due time, and also praying that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

The Court having duly considered the same does hereby allow the said writ of error prayed for, and it is Ordered that upon the giving by said defendant, Pacific Coast Coal Company, a corporation, of a bond according to law, in the sum of Six

Thousand and no/100 ($6000.00) Dollars, the same shall operate as a supersedeas bond and all proceedings be stayed, pending the determination of said writ of error.

Dated this 15th day of April, A. D. 1913.

EDWARD E. CUSHMAN,
Judge.

Copy of foregoing order received and service of same acknowledged this 15th day of April, A. D. 1913.

H. R. LEA,
Attorney for Plaintiff.

[Endorsed]: Order Granting Writ of Error and Fixing Amount of Bond. Filed in the U. S. District Court, Western Dist. of Washington, Apr. 15, 1913. Frank L. Crosby, Clerk. By Ed. M. Laken, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1978

STANLEY BROWN,
Plaintiff,

vs.

PACIFIC COAST COAL COMPANY, a corporation,
Defendant.

SUPERSEDEAS BOND.

Know all men by these presents, that we Pacific Coast Coal Company, a corporation, defendant in the above entitled action, as principal and J. W.

Smith and James Anderson as sureties, are held and firmly bound unto Stanley Brown, plaintiff in the above entitled action, in the sum of $6000.00 to be paid to said plaintiff, his heirs, executors, administrators or assigns, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, administrators and successors jointly and severally by these presents. (Seal). Sealed with our seals and dated this 15th day of April, 1913.

The condition of the above obligation is such that

Whereas, in the above court and cause final judgment was rendered against the defendant Pacific Coast Coal Company and in favor of the plaintiff Stanley Brown in the sum of Four Thousand Dollars ($4,000.) with interest thereon at legal rate from May 29th, 1912 and for his costs and disbursements incurred and expended; and

Whereas the said defendant has obtained from the said court a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment of said court in said action, and a citation directed to the said Stanley Brown, plaintiff, is about to be issued citing him to appear before the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco in the State of California;

Now therefore, if the said defendant Pacific Coast Coal Company a corporation, shall prosecute the said writ of error to effect and shall answer all costs and damages if it fail to make its plea good,

then the above obligation shall be void, otherwise to remain in full force nad effect.

(Corporate Seal)
PACIFIC COAST COAL CO.,
Principal,
By J. W. SMITH, Secretary,
J. W. SMITH,
Surety
JAS. ANDERSON,
Surety

J. W. Smith and James Anderson, sureties named in the foregoing bond, being first duly sworn, each for himself and not one for the other, deposes and says: I am a resident of King County, Washington, not an attorney or counsellor at law, judge of Superior Court, sheriff or deputy or an officer of any court in the State or of the United States; I am worth the sum of $6000.00 in separate property situated in the State of Washington, over and above all debts and liabilities and exclusive of property exempt from execution.

J. W. SMITH,
JAS. ANDERSON,

Subscribed and sworn to before me this 15th day of April, 1913.

(Seal) STANLEY J. PADDEN,
Notary Public in and for the State of Washington, residing at Seattle.

The above and foreging bond, and the sufficiency of the sureties thereon is hereby approved by me

this 15th day of April, 1913.

EDWARD E. CUSHMAN,

Judge of the District Court of the United States for Western District of Washington.

Copy of within Supersedeas bond received and due service of same acknowledged this 15th day of April, 1913.

R. H. LEA,

Attorney for Plaintiff.

[Endorsed]: Supersedeas Bond. Filed in the U. S. District Court, Western Dist. of Washington, Apr. 15, 1913. Frank L. Crosby, Clerk. By Ed. M. Laken, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

United States Circuit Court of Appeals for the Ninth Judicial Circuit.

No. 1978

STANLEY BROWN,

Plaintiff,

vs.

PACIFIC COAST COAL COMPANY, a corporation,

Defendant.

WRIT OF ERROR.

United States of America.—ss.

The President of the United States of America to the Judges of the District Court of the United States for the Western District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said District Court before you, or some of you, between Stanley Brown, plaintiff, and Pacific Coast Coal Company, a corporation, defendant, a manifest error hath happened, to the great damage of the said Pacific Coast Coal Company, a corporation, defendant, as is said and appears by the complaint, we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid, in this behalf, do command you, if any judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justice of the United States Circuit Court of Appeals for the Ninth Circuit, at the courtrooms of said court in the City of San Francisco, in the State of California, together with this writ, so that you have the same at the said place before the justice aforesaid, within thirty (30) days from the date of this Writ, that the record and proceedings aforesaid being inspected, the said justice of the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 15th day of April, in the year of our Lord one thousand nine hundred and thirteen, and

of the Independence of the United States the one hundred and thirty-seventh.

FRANK L. CROSBY,

Clerk of said District Court of the United States, for the Western District of Washington.

The foregoing writ is hereby allowed this 15th day of April, 1913.

EDWARD E. CUSHMAN,

United States District Judge for the Western District of Washington.

Copy of the within Writ of Error received, and due service of same acknowledged this 15th day of April, 1913.

H. R. LEA,

Attorney for Plaintiff.

[Endorsed]: Writ of Error, Lodged Copy. In the District Court of the United States for the Western District of Washington Northern Division Stanley Brown, Plaintiff, vs. Pacific Coast Coal Company, Defendant. Filed in the U. S. District Court, Western Dist. of Washington April 15, 1913. Frank L. Crosby, Clerk. By Ed. M. Laken, Deputy. Farrell, Kane & Stratton P. O. and office address 734-739 Central Building 1011 American Bank Bldg., Seattle, Wash. Attorneys for Defendant.

United States Circuit Court of Appeals for
In the ~~District Court of the United States for the~~ the Ninth Judicial Circuit.
~~Western District of Washington, Northern Division.~~

No. 1978

STANLEY BROWN,

Plaintiff,

vs.

PACIFIC COAST COAL COMPANY,

Defendant.

CITATION.

(Lodged Copy.)

The United States of America.—ss.

The President of the United States, to Stanley Brown and to H. R. Lea, his attorney, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco in the State of California within thirty (30) days from the date of this Writ pursuant to the terms of a Writ of Error filed in the Clerk's Office of the District Court of the United States for the Western District of Washington, Northern Division, wherein Stanley Brown is plaintiff, and Pacific Coast Coal Company is defendant; to show cause, if any there be, why the judgment in said Writ of Error mentioned shold not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States of America, this 15th day of April, A. D. one thousand nine hundred and thirteen and of the Independence of the United States, one hundred and thirty-seven.

Dated this 15th day of April, 1913.

EDWARD E. CUSHMAN,

United States District Judge presiding in the United States District Court for the Western District of Washington, Northern Division.

Attest: FRANK L. CROSBY,

Clerk of the United States District Court for the Western District of Washington.

I hereby acknowledge due and regular service of the foregoing Citation in the City of Seattle this 15th day of April, 1913.

H. R. LEA,

Attorney for Stanley Brown.

Received copy of the foregoing Citation lodged with me for the defendant in error this 15th day of April, 1913.

FRANK L. CROSBY,

Clerk of the United States District Court for the Western District of Washington.

[Endorsed]: Citation, Lodged Copy. In the District Court of the United States for the Western District of Washington Northern Division Stanley Brown, Plaintiff, vs. Pacific Coast Coal Company, Defendant. Filed in the U. S. District Court, Western Dist. of Washington, April 15, 1913. Frank L. Crosby, Clerk. By Ed. M. Laken, Deputy. Farrell,

Kane & Stratton P. O. and office address 734-739 Central Building 1011 American Bank Bldg. Seattle, Wash. Attorneys for Defendant.

In the United States District Court for the Western District of Washington, Northern Division.

No. 1978

STANLEY BROWN,

vs. Plaintiff,

PACIFIC COAST COAL COMPANY,

Defendant.

STIPULATION AND ORDER.

The plaintiff having introduced in evidence at the time of trial herein a diagram which was marked at said time "plaintiff's exhibit A," the same having been mislaid by the Clerk,

NOW THEREFORE, IT IS HEREBY STIPULATED by and between the parties hereto that the plaintiff may substitute a copy of said diagram for said original, which copy having been filed this day with the Clerk, the parties hereto agree is a true and correct copy of said original heretofore filed.

IT IS FURTHER STIPULATED AND AGREED that the Clerk in making up his return to the Writ of Error herein shall include and transmit as a part of said record and return said copy which is now marked "plaintiff's exhibit A," which need not be printed.

Dated this 15th day of April, 1913.

H. R. LEA,
Attorney for Plaintiff.

FARRELL, KANE & STRATTON,
Attorneys for Defendant.

Pursuant to the foregoing Stipulation and the Court now deeming it just and proper, it is hereby ORDERED, ADJUDGED AND DECREED that a copy of plaintiff's exhibit "A" be filed with the Clerk in place and instead of the original which has been misplaced, and that the Clerk in making up his return to the Writ of Error herein send said copy to the Circuit Court of Appeals as a part of said record, and the same need not be printed.

Done in open court this 15th day of April, 1913.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Stipulation and Order. Filed in the U. S. District Court, Western Dist. of Washington, April 21, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1978

STANLEY BROWN,

Plaintiff,

vs.

PACIFIC COAST COAL COMPANY, a corporation,

Defendant.

CORRECTED STIPULATION.

It is hereby stipulated and agreed by and between the parties hereto, through their respective attorneys:

I.

That neither of said parties on the appeal of said case will raise any objection, going other than to the merits of the said case, and diligence in the prosecution of the appeal, and hereby stipulate that all orders, judgments and decrees made by Judges Hanford, Howard and Cushman, have been regularly and lawfully made at the time and in the manner provided by law, and that the manner of obtaining the same, both as to procedure and method, was regular and proper in every respect, and that each of said judges acted within their jurisdiction in making all orders made herein.

II.

It is further stipulated that the bill of exceptions in the above entitled action, both as to form thereof and as to the time and manner of settling and filing the same, and as to the procedure in method leading up to the obtaining and settling of the same is proper in every respect, and that no objection will be raised thereto in the Circuit Court of Appeals.

III.

That the following designated papers, together with plaintiff's exhibit "A," Original Writ of Error and Original Citation, comprise all the papers, exhibits, depositions, or other proceedings which are necessary to the hearing of said cause upon writ of error in the United States Circuit Court of Appeals, and in preparing the record in return to said writ of error, only copies of such papers, with the matters set out upon the covers of the same and the numbering on the pages of same

eliminated need be included therein, to-wit:

1. Petition Order and Bond on Removal from Superior Court.

2. Amended Complaint.

3. Answer to Amended Complaint.

4. Reply.

5. Verdict. 6. Judgment. 7. Motion for a new trial and affidavits filed by defendant in support thereof.

8. Counter affidavits of plaintiff and defendant on motion for new trial.

9. Motion for judgment notwithstanding the verdict.

10. Order overruling motion for new trial.

11. Order overruling motion for judgment notwithstanding the verdict.

12. Opinion of court on motion for new trial and judgment notwithstanding the verdict.

13. Bill of Exceptions.

14. Assignment of errors.

15. Petition for order allowing writ of error.

16. Order granting writ of error and fixing amount of bond.

17. Supersedeas Bond.

18. Writ of Error.

19. Original citation and acceptance of service thereon.

20. Copy of citation lodged with clerk for defendant in error.

21. Stipulation and Order as to Exhibit.

22. Corrected Stipulation as to record and Bill of Exceptions.

Dated this 26th day of April, 1913.

H. R. LEA,
Attorney for Stanley Brown.
FARRELL, KANE & STRATTON,
Attorneys for Pacific Coast Coal Company.

[Endorsed]: Corrected Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, April 30, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

No. 1978.

STANLEY BROWN,

Plaintiff,

vs.

PACIFIC COAST COAL COMPANY,

Defendant.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD, ETC.

United States of America,
Western District of Washington.—ss.

I, Frank L. Crosby, Clerk of the United States trict Court, for the Western District of Washington, District Court, for the Western District of Washington, do hereby certify that the foregoing 223 printed pages, numbering from 1 to 233 inclusive, with the Writ of Error and original citation with acceptance of service thereon, which are printed upon pages 235 to 240 herein to be a full, true,

correct and complete copy of so much of the record, papers, depositions and other proceedings in the above and foreging entitled cause as are necessary to the hearing of said cause on writ of error therein in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same, together with the original copy of plaintiff's exhibit "A" by the order of court substituted and filed in place of the original in this court and transmitted herewith pursuant to the order of the court so directing, constitute the record on return to said writ of error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that I hereto attach and herewith transmit the original writ of error and original citation issued in this cause.

I further certify that the cost of preparing the portion of said transcript prepared by me and of certifying the whole thereof is the sum of ($4.00) Four and 00/100 dollars, which sum has been paid to me by Messrs. Farrell, Kane & Stratton, attorneys for the defendant, Pacific Coast Coal Company.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court at Seattle, in said district, this 23rd day of May, 1913.

FRANK L. CROSBY,
Clerk.

(Seal)

By.....
Deputy.

United States Circuit Court of Appeals for
In the District Court of the United States for the
the Ninth Judicial Circuit.
Western District of Washington, Northern Division.

No. 1978

STANLEY BROWN,
Plaintiff,

vs.

PACIFIC COAST COAL COMPANY, a corporation,
Defendant.

WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America to the Judges of the District Court of the United States for the Western District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said District Court before you, or some of you, between Stanley Brown, plaintff, and Pa-

cific Coast Coal Company, a corporation, defendant, a manifest error hath happened, to the great damage of the said Pacific Coast Coal Company, a corporation, defendant, as is said and appears by the complaint, we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid, in this behalf, do command you, if any judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justice of the United States Circuit Court of Appeals for the Ninth Circuit, at the courtrooms of said court in the city of San Francisco, in the State of California, together with this writ, so that you have the same at the said place before the justice aforesaid, within thirty (30) days from the date of this Writ, that the record and proceedings aforesaid being inspected, the said justice of the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 15th day of April, in the year of our Lord one thousand nine hundred and thirteen, and of the

Independence of the United States the one hundred and thirty-seventh.

FRANK L. CROSBY.

(U. S. District Court Seal)

Clerk of said District Court of the United States, for the Western District of Washington.

The foregoing writ is hereby allowed this 15th day of April, 1913.

EDWARD E. CUSHMAN,

United States District Judge for the Western District of Washington.

Copy of the within Writ of Error received, and due service of same acknowledged this 15th day of April, 1913.

H. R. LEA,
Attorney for Plaintiff.

[Endorsed]: Writ of Error. In the District Court of the United States for the Western District of Washington Northern Division Stanley Brown, Plaintiff, vs. Pacific Coast Coal Company, Defendant. Filed in the U. S. District Court, Western Dist. of Washington, Apr. 15, 1913. Frank L. Crosby, Clerk. By Ed. M. Laken, Deputy. Farrell, Kane & Stratton P. O. and Office address 734-739 Central Building 1011 American Bank Bldg. Seattle, Wash. Attorneys for Defendant.

United States Circuit Court of Appeals for
In the District Court of the United States for the
the Ninth Judicial Circuit.
Western District of Washington; Northern Di-
vision:

No. 1978

STANLEY BROWN,

Plaintiff,

vs.

PACIFIC COAST COAL COMPANY,

Defendant.

CITATION.

The United States of America.—ss.

The President of the United States, to Stanley Brown and to H. R. Lea, his attorney, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco in the State of California within thirty (30) days from the date of this Writ pursuant to the terms of a Writ of Error filed in the Clerk's Office of the District Court of the United States for the Western District of Washington, Northern Division, wherein Stanley Brown is plaintiff, and Pacific Coast Coal Company is defendant; to show cause, if any there be, why the judgment in said Writ of Error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States of America this 15th day of April, A. D. one thou-

sand nine hundred and thirteen and of the Independence of the United States, one hundred and thirty-seven.

Dated this 15th day of April, 1913.

EDWARD E. CUSHMAN,

United States District Judge presiding in the United States District Court for the Western District of Washington, Northern Division.

(Seal of U. S. Dist. Court)

Attest: FRANK L. CROSBY,

Clerk of the United States District Court for the Western District of Washington.

I hereby acknowlege due and regular service of the foregoing Citation in the City of Tacoma this 15th day of April, 1913.

H. R. LEA,

Attorney for Stanley Brown.

Received copy of the foregoing Citation lodged with me for the defendant in error this 15th day of April, 1913.

FRANK L. CROSBY, Clerk,

By Ed. M. LAKEN, Deputy.

Clerk of the United States District Court for the Western District of Washington.

[Endorsed]: Citation. In the District Court of the United States for the Western District of Washington Northern Division Stanley Brown, Plaintiff, vs. Pacific Coast Coal Company, Defendant. Filed in the U. S. District Court, Western Dist. of Washington, April 17, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. Farrell, Kane &

Stratton P. O. and office address 734-739 Central Building 1011 American Bank Bldg. Seattle, Wash. Attorneys for Defendant.

United States

Circuit Court of Appeals

For the Ninth Circuit

PACIFIC COAST COAL COMPANY,

Plaintiff in Error,

vs.

STANLEY BROWN,

Defendant in Error.

STATEMENT OF CASE.

This is an action brought by Stanley Brown as plaintiff against Pacific Coast Coal Company, defendant to recover damages for personal injuries

alleged to have been due to the negligence of the defendant and to have been sustained by Brown while he was in the employ of the defendant as a coal miner, in the defendant's coal mine at Black Diamond, Washington. The case was removed by the defendant from the State Court to the Federal Court on account of a diversity of citizenship between the parties. The evidence shows that on the 17th day of September, 1910, the plaintiff was with his partner, one Joe Yeshon, working in breast No. 75 of the defendant's mine; that about 10:10 o'clock P. M. he and his partner had bored the holes, tamped and placed shots or blasts in the face of the vein of coal and all was in readiness for these blasts to be fired. That it was the duty of another employee known as the fire boss or shot-lighter to fire these shots or blasts, and while awaiting the coming of the shot-lighter or fire boss the plaintiff and his partner walked down out of breast No. 75 into the cross cut which is a cross section of the workings from which the breast branches off. That upon reaching the cross cut the plaintiff and his partner sat down and ate their lunch. After they had finished their meal and had been in the cross cut altogether about half an hour, the fire boss, one Ignish Rigghi, came up and said to them, "Have you got your shots ready?" They answered, "Yes, we have them ready half an hour." Whereupon Rigghi said, "Show me where you have the holes". To this the plaintiff answered "Be careful there is gas inside," and Rigghi replied "Never

mind the gas." Whereupon all three ascended the breast to the face. Rigghi, the fire boss, was equipped with a special kind of lamp designed for the purpose of discovering gas. This lamp the miners did not have. Before lighting the fuses it was the work of Rigghi to make a test for gas, that is, go about the room where the miners were working and by passing the lamp through the crevices and open spaces determine thereby whether there was any gas in the chamber which might cause an explosion. Rigghi says that he did make the test but the plaintiff and his partner testify that Rigghi made no test but immediately set about to light the fuses that would fire the blasts. In order to do this the fire boss first took a piece of wire and placed it within the iron wire mesh which surrounded his lantern and left it there until the heat of the lantern caused it to glow; he then took this wire and applied it to the touch paper which does not blaze but simply glows red. This touch paper was then applied to the fuse which led to the blasts causing such fuses to ignite and to fire the blasts. This process of heating the wire, lighting the paper and then applying it to the fuse took several minutes. When the plaintiff's partner saw that Rigghi was proceeding to place the wire in the lantern and was preparing to light the fuse without making a test for gas he became frightened and ran out; but the plaintiff stayed in the chamber. When the fire boss applied the glowing touch paper to the end of the fuse, the powder in the

fuse sputtered and made a spark. At that instant there was an explosion. On account of this explosion the plaintiff alleges that he was thrown down the breast and burned and injured in the side, for which burns and injury he now sues. The plaintiff's partner escaped uninjured, having reached the crosscut before the explosion occurred. The plaintiff sued for $4,675 and the jury returned a verdict for $4,000.

The negligent acts charged by the plaintiff's complaint (See Par. IV. Complaint, Transcript of Record, page 9) are

I. That defendant improperly ventilated the mine in question.

II. That the fire boss or shot lighter negligently lighted a shot at a time when there was an accumulation of gas in the mine and without making a test for gas before so doing.

The answer of the defendant made general denial of the allegations of negligence and set up three affirmative defenses of assumption of risk, fellow servant and contributory negligence. (See p. 11, Transcript of Record.)

By assignments of error Nos. 1, 2, 3, 4 and 5 respectively which are urged and relied upon at this time the defendant sets up that the Court erred:

I. In denying defendant's motion to dismiss made at the close of the opening statement made by counsel for the plaintiff. (T. of R., p. 79).

II. In denying defendant's motion to dismiss and for a non-suit made at the close of plaintiff's evidence. (T. of R., p. 160).

III. In denying defendant's motion to dismiss and to direct a verdict in favor of the defendant made at the close of all the evidence. (T. of R., p. 196).

IV. In overruling defendant's motion for a judgment notwithstanding the verdict. (T. of R., p. 60).

V. In entering judgment in favor of the plaintiff for the sum of four thousand dollars ($4000). (T. of R., p. 15).

Each of these assignments is based upon the same general grounds, namely:

1. That the opening statement of counsel and the evidence introduced failed to state or show any negligence of the defendant which was the proximate cause of the injury.

2. That by said opening statement and from the evidence introduced it was admitted and affirmatively appeared that the injuries of the plaintiff were due to and proximately caused by acts,

omissions and conditions, the risks and hazards of which the plaintiff assumed upon entering into the employment of the defendant and by remaining therein and especially by remaining in the place where he was alleged to have been injured at the time of his alleged injuries.

3. For the reason that by all the evidence in the case it affirmatively appeared that the alleged injuries of the plaintiff were due to and proximately caused by the acts of a fellow servant engaged in the same common employment with the plaintiff.

4. For the reason that by all the evidence in the case it affirmatively appeared that the plaintiff was guilty of negligence which was the proximate cause of and which directly contributed to his alleged injuries. (Assignments, T. of R., p. 208).

By Assignment of Error No. VI, now relied upon and urged, the defendant asserts that the Court erred in denying defendant's petition for a new trial. (Assignments, T. of R., p. 214).

1. For the reason that by said petition and affidavits filed in support thereof it was affirmatively shown that the defendant has obtained subsequent to the trial newly discovered evidence which was material to its defense, and which should have been submitted to a jury determining the issues in the above entitled action.

2. For the reason that the damages awarded the plaintiff by the jury were excessive and were given under the influence of passion and prejudice. By Assignment of Error No. VII, now relied upon and urged the defendant alleges that the Court erred in giving the following instructions to the jury: (Assignments, T. of R., p. 214).

1. "Now if there was any neglect on the part of the defendant corporation to provide for the ventilation of the mine in which the plaintiff was at work that is a breach of legal obligation which creates a legal liability to render compensation for the injury suffered. That is an obligation which rests upon the employer to the extent that it cannot be delegated to some one else. I mean by that the employer cannot say 'I appoint my superintendent or my foreman to attend to that and the failure to provide suitable ventilation is the failure of an employee—a fellow employee with the plaintiff.' The employer is not allowed to make that defense in regard to that particular duty and obligation. Whoever was placed in the position to see to the ventilation was the representative of the defendant corporation, and for the purpose of deciding the case is to be considered as the principal in the matter. (Instructions, T. of R., p. 198, l. 21).

2. You are instructed that the law requires that the owner, agent or operator of a coal mine must furnish not only a reasonably safe place in which to work, but also safe appliances, and this includes the timber required with which to provide and maintain a good and sufficient ventilation to carry out dangerous gases. (T. of R., p. 199).

3. You are instructed that the duty of inspection, prevention and removal of any accumulation of gas is imposed on the Coal Company. This

duty is personal and cannot be delegated, and any person who for the Company was engaged in an employment having as part of his duties the duty of inspection, prevention and removal of any accumulation of gas is not a fellow servant of a coal miner with respect to the performance of that duty. (T. of R., p. 199).

4. Now, a man may be a fellow servant in the general operations of the coal mine but wherever he is charged with the employer's specific duty of providing for ventilation and suitable means for making the operation of the mine safe, he is not a fellow servant in the performance of those duties. (T. of R., p. 199).

A coal company employing such person would be responsible for all damages caused by reason of negligence in the performance of his duties in the prevention, inspection and removal of any accumulation of gas. (T. of R., p. 200).

You are instructed that an employee of a coal company one of whose duties it is to test for gas in a coal mine is not a fellow servant with the coal miner so far as he is engaged in the performance of such duty." (T. of R., p. 200).

By Assignment of Error No. VIII now urged and relied upon the defendant asserts that the Court erred in denying defendant's motion to strike certain testimony of the plaintiff which testimony was as follows: (T. of R., p. 86, l. 18).

"A. Yes sir, from the top. But I know I had a chance to build a brattice before, and I asked Mr. Righi about timbers and planks and he said 'All right, I will get them up' and tomorrow or the next day I ask him the same thing and he says, 'Just all right, you get it', but that 'all right' never be.

Q. Did he bring you the timbers?

A. I never see before I get hurt.

MR. FARRELL.—We object to that and move to strike out the answer. There is no complaint that there was not brattice or timbers.

THE COURT.—The objection is overruled.

(Exception noted for defendant)."

Assignments of Error Nos. 1 to 5 inclusive involving as they do the same general points will for the purpose of brevity and convenience be argued together. (Assignments, T. of R., p. 208).

I. The *plaintiff assumed the risk and was guilty of contributory negligence.*

The evidence plainly shows that Brown was an old and experienced miner having been engaged in coal mining for five or six years previous to this accident. (Transcript of Record, p. 87, l. 12 to 14). That Brown had been working in Breast 75, the place where he was injured, for five and one-half days before the accident. (Transcript of Record, p. 75, l. 28-29). It further shows that Brown knew positively that there was gas in the breast when he followed Righghi to the face.

In counsel's opening statement to the jury, he makes the following admissions: "Stanley and Joe

left the cross-cut, walked down the manway to the breast and showed him the shots; but before they went they said to Rigghi 'there is gas in there'. (Transcript of Record, p. 77, l. 31; p. 78, l. 1 to 3).

Again counsel said: "Any miner using a safety lamp as these were can tell whether there is gas in a mine and those boys had detected gas and warned Rigghi that there was gas in the mine." (Transcript of Record, p. 78, l. 3 to 6).

Stanley Brown in relating his meeting with Rigghi testified as follows:

"A. I go, up to the face you know and tell him, I said 'Be careful' I said, 'there is gas inside.' (Transcript of Record, p. 82, l. 23-24).

Again on cross examination the same witness said:

"Q. Just tell the jury what you said to the fire boss about there being gas up there.

A. Well I told him that, I say 'If careful if you are going up the face. There is gas' I told him.

Q. You told him if he was going up to the place that there was gas up there?

A. Yes and he said 'Never mind gas' he said.

Q. How long before that did you notice gas in there before you knocked off work.

A. I know after I start working there. I know next day." (See Transcript of Record, p. 98).

Again, (Transcript of Record, p. 97, l. 15 to 19):

"Q. How long before you went up in there with the fire boss that you noticed the gas in there in the breast—a couple of hours?

A. Well, I was there about half an hour down in the counter after I had the shots ready."

On cross examination, Joe Yeshon, the plaintiff's partner, a witness for the plaintiff, testified as follows: (Transcript of Record, p. 128):

"Q. Ask him if he heard Stanley tell Righghi the fire boss, when they were in the cross cut, that there was gas up there and to look out.

A. Yes he heard him when he said that."

Not only did he know positively that the gas was there at that particular time and warned the fire boss against it, but he knew that this was a gaseous mine and that this particular breast was gaseous; that the gas was constantly oozing out of the crevices and the condition of the chamber changing and that because of the fact that the brat-

tice was eight or ten feet from the face and the further fact that he and his partner had not been working and causing a commotion in there for half an hour there would be a considerable accumulation of gas when the fire boss and himself entered. He knew that on former occasions he had to stop and take the gas out.

Counsel in his statement to the jury before the evidence made the following admission: (Transcript of Record, p. 77, l. 6 to 19):

"We will show the significance of that half an hour is this, that he had reason to know, as ANY MINER WOULD KNOW, that by mining, brattice being about 10 feet away from the breast, that by mining there is a commotion of the air and that very commotion causes a mixture of the gas with the air and it is swept off while if there is not that commotion the gas oozes out of the coal and gradually rises and stays dormant against the top of the mine. We will show that he had every reason, knowing that those boys had not been there working for half an hour, to believe that there would be an accumulation of gas by reason of that very fact that they had waited half an hour."

Stanley Brown, the plaintiff, on cross examination testified as follows: (Transcript of Record, p. 96, l. 2 to 5)

"Q. Whenever you dig a hole in there some gas would come out.

A. Yes, if you are digging there is gas over there, but you see if you working there is lots of air, and all the gas does down."

Again, (Transcript of Record, p. 96, l. 20 to 32; p. 97, l. 1 to 7):

"Q. Would you notice gas in there before the night you were hurt?

A. I know there is gas there.

Q. In every mine like the Black Diamond mine, when they bore holes or dig coal there is always a little gas escapes.

A. Yes sir, you know there is gas, but if you are working all the gas comes out.

Q. Where did that gas come from that you noticed in there that night before you got hurt?

A. From the coal.

Q. From the coal that you were digging out?

A. Well, that time after you stop working for a while there is gas forms.

Q. That comes from the coal you were digging.

A. That comes from the coal after you stop working after you are digging, it might come out

—I don't know, but if you are working all the gas goes out, you see."

Again (Transcript of Record, p. 99, l. 1 to 29):

"Q. You said when you saw the fire boss you told him there was gas up in there and to look out and he said there was no danger.

A. Because any time I go down to the cross-cut to my meal I don't shoot anything before that, not before that day and after I go to the face and I look at the gas and find it many times the gas you see.

Q. There has been gas there several times.

A. Yes, before that and I got to do something and I take that gas out.

Q. Now, when you met the fire boss down there when you were eating your lunch you say you told him there was gas up there and to look out.

A. Yes.

Q. How long had the gas been in there?

A. I suppose as soon as we start to work we started the gas.

Q. How long had you been out of there eating your lunch before the fire boss came along?

A. Just about half an hour, because we finished everything and we were going down to start eating our dinner and it takes about half an hour.

Q. And there was gas coming in there and accumulating when you went to eat the lunch and you *thought there would be quite a little by the time the foreman got up there, and that was the reason you told him to look out.*

A. Yes."

Again the same witness testified that he had helped build this brattice in this breast and at the time of the accident it was eight or ten feet from the face. That he had worked in other mines where brattice was used. (See Transcript of Record, p. 86, l. 1 to 5; p. 101, l. 30-32; p. 102, l. 1 to 12), and then as follows (Transcript of Record, p. 103, l. 25 to 31; p. 104, l. 18 to 32):

"Q. There should have been some more brattice up there, should there not?

A. Yes sir.

Q. And you would have put it up if you had had the timber there, is that it?

A. Yes.

"Q. Just what is that brattice used for; what do you want to put up the brattice for?

A. So that we can get the air up there.

Q. So that you could get the air in there—and if there had been timber there you would have put up some more brattice so as to keep the air going in.

A. Yes.

Q. And without the brattice the gas was bound to accumulate there, wasn't it?

A. Well I suppose so.

Q. But the object of the brattice was to keep the air circulating and to keep it clear in there and to brush out the gas.

A. Yes."

Joe Yeshon the plaintiff's partner testified to the same effect as follows (Transcript of Record, p. 129, l. 22 to 31):

"Q. Was not the brattice there to keep the air circulating and drive out the gas.

A. They built the brattice for that, for to keep the air there.

Q. And if the brattice was not there the air would not circulate.

A. Yes.

Q. And the gas would accumulate in there where they were working, wouldn't it?

A. Yes. (Witness excused.)"

Joe Yeshon, the plaintiff's partner further testified as follows:

"Q. On other days than this one day did Stanley tell Rigghi that he had found gas on the breast?

A. Before that, why there were talking about it and he said himself that there was a little gas there.

Q. Righi said there was gas there?

A. Righi and they talked it over." (Transcript of Record, p. 125, l. 7 to 13).

Mr. Pfeiffer, a mining engineer, called by the plaintiff testified as follows:

"Q. Now Mr. Pfeiffer, is this outflow of gas from the coal on to the breast a steady outpouring, and if so, whether it is, and how it is, and whether it is not; state fully as you can.

A. It may be and it may not be. The gas is contained in the seams of coal from the adjoining strata and it may be present throughout the entire seam in small quantity under low pressure,

and the emission of the gas may be very gradual and continuous. On the other hand, it may be held in pockets under very high pressure. In that case we have a condition, when in the course of mining one of those pockets is opened, the gas will come out with considerable velocity and rush, and it may last from a very short time to a very considerable time, depending on the size of the reservoir, containing the gas. Those are called blowers, I believe." (Transcript of Record, p. 133, l. 27 to 32; p. 134, l. 1 to 12).

Again (Transcript of Record, p. 137, l. 6 to 15) as follows:

"Q. When they are drilling to open shafts, the gas will escape more or less in all coal mines.

A. Yes sir, certainly.

Q. And also when they are digging coal.

A. And also when they are digging coal.

Q. Sometimes they are apt to run into a pocket of gas in the ordinary coal mining?

A. Yes.

Q. It will escape more at one time than at another?

A. Certainly."

To the same effect is the testimony of George Buscho, a witness for the plaintiff. (See Transcript of Record, p. 155, l. 1 to 12)

Brown knew that only the shot lighter could fire the shots, and not the men, simply because the shot lighter was equipped with a special lamp, given him for the purpose of testing for gas before he fired any shots. He knew that the first thing the shot lighter should do was to test for gas. He had seen the shots fired many times. He was familiar with the way of testing for gas and the manner in which this testing lamp was manipulated so that when the shot lighter did not make the test he knew it. He knew that Righghi had not been in there for many hours before and consequently could not tell whether there was any gas there or not, unless he made a test with his lamp. He saw plainly that Righghi did not make this test.

Brown himself testified as follows: (Transcript of Record, p. 83, l. 13 to p. 84, l. 5).

"Q. Did Mr. Righi make a test for gas?

A. No, no.

Q. You have seen him or other fire bosses testing for gas before.

A. Yes.

Q. How do they test for gas?

A. Any mine I work you got to tell anything to the fire boss or anything like that, if he goes to the face, I see lots of times the fire boss in the mine work—the first thing he go to the face and he look at the gas—if there is any gas in the mine—but Righi, any time he go up I never see if he look at the gas—he take that touch paper—

Q. How do you test for gas; what method does the fire boss use?

A. If you have the safety lamp, if you are going to the face, if you know there is sure lots of gas, you have got to go slow—you go into the face slow.

Q. Did this man have a safety lamp at the time?

A. Righi?

Q. Yes.

A. Sure, he did.

Q. What kind of a safety lamp did he have?

A. He had a different lamp from what I had —he had the wire screen—no glass."

Again (Transcript of Record, p. 84, l. 17 to 27):

"A. (Mr. Lea) Now what is the effect of the presence of gas upon that lamp, if you know?

A. If you are going slow, for sure gas over there, there is some kind of blue light—you can tell whether there is gas, but you have to be slow—you have to take it slow down—if you pull it quick it will explode just the same, because there is something pulls that light out, but you have to go slow—if there is much gas you have to go slow, and that old gas comes out and as soon as you get a little air that gas comes out of the lamp."

Again (Transcript of Record, p. 85, l. 8 to 12):

" * * * and he lighted the touch paper and he never look anything about any gas or anything like that, and I show him that hole and he go in and take the touch paper and stick it to the fuse."

Again (Transcript of Record, p. 108, l. 16 to 29):

"A. Yes, I will tell you, gentlemen, here is the safety lamp. Suppose the fire boss come to the face, you know, he got gas sometimes in the mine, you see, he got to go slow and look for the gas like that, and another time comes a blue light and it is in through the screen and if he get it slow down, and that gas all come out if you get

it in here (showing) see, but if any come out here if you stick it right there (showing) and it is gas and the explosion takes place you can get out quick —it is so slow, like this.

Q. When you went in there with him and held his lamp up was he testing for gas then?

A. No, sir."

Joe Yeshon, plaintiff's partner, testified as follows: (Transcript of Record, p. 123, l. 27 to 30).

"Q. Just a minute before he goes any further, did Righi test for gas—make a test for gas, with the lamp before he lighted the fuse?

A. No."

The testimony further shows that the accident happened at 9:30 P. M. and that Rigghi had been in there last before at 6:30 P. M. (See Transcript of Record, p. 189 ,l. 23 to 24 and p. 190, l. 8 to 12).

It is most hazardous to light a fuse in the presence of gas, no careful miner would do it, and plaintiff realizing this warned the shot lighter to be careful. It is a well known fact that a fuse will sputter and make sparks that will light any gas that might be present. Notwithstanding his knowledge of all these things the plaintiff knowing there was gas present, knowing that no test had been made, knowing that the spark of the fuse would

ignite the gas, stood there in the midst of the peril and made no attempt to get away from it. His partner under the same conditions, and when he saw that no test was to be made, ran out to the cross cut and was uninjured.

In his opening statement counsel made the following admission: (Transcript of Record, p. 79, l. 13 to 20).

"We will show that it is gross and criminal negligence to light a shot in the presence of known gases and when this man had been warned, that there was absolutely no excuse or reason for him to have lighted the gases. We will show that a fuse will light gases under certain circumstances, and that such fact is well known."

The plaintiff testified as follows:

"Q. So then the gas exploded when these sparks flew out of the fuse.

A. Out of the fuse yes, sure.

Q. There was not any blaze or light like a match or anything like that.

A. No, not any.

Q. How far were you standing at that time?

A. Right behind him right there."

Mr. Pfeiffer, a witness for the plaintiff testified "that fire damp was very likely to be ignited by lighting a fuse in its presence, and that it was customary and necessary to be absolutely certain that there was no gas in the place before lighting a fuse." (Transcript of Record, p. 135, l. 21 to 25).

George Buscho, a witness for the plaintiff testified as follows: (Transcript of Record, p. 150, l. 3 to 8).

"Q. Is there great danger of lighting a shot in a gaseous condition?

A. It is the most danger there is, that is how the explosion happens. If there is gas in a place and he lights it and it don't go off, or it goes off with the shot, that makes the worst kind of an explosion."

Also as follows (Transcript of Record, p. 152, l. 14 to 23):

"Q. Are you acquainted with the fuse used in igniting blasts (showing specimen to the witness).

A. Sure.

Q. Is there any danger of lighting a fuse of that character in a place where there is an accumulation of gas and if so, state what it is.

A. Sure, where there is gas and if you go to light one of those fuses it is liable to spit out sparks and set the gas off—sometimes the fuse sparks like a fire cracker."

Again as follows (Transcript of Record, p. 156, l. 20 to 32; p. 157, l. 6 to 12):

"Q. Assuming that there was not sufficient brattice there and you had been working up there and you knew that the fire boss was going up to light a shot, you would not consider it safe to go up with him, would you?

A. Well, if you was going up there to light a shot and if I had known there was gas there or stuff like that, I would tell him.

Q. You would be afraid to go up with him until he inspected it for gas.

A. I would be afraid sure.

Q. It would not be safe to go up in there?

A. It would not be safe to go up in there.

Q. If you went up with the fire boss and you knew there was gas up there before you went up, you would not stay there until he lighted the shot, if he did not make a good inspection.

A. No.

Q. You would go back where?

A. I would go back to the crosscut."

In his opening statement referring to the plaintiff's partner, counsel said (Transcript of Record, p. 78, l. 16 to 19):

"Joe again called his attention to the fact that there was gas there and frightened, he ran out and down the manway and into the crosscut."

See also testimony of Joe Yeshon, who testified by an interpreter as follows (Transcript of Record, p. 124, l. 1 to 21):

"A. When he started to light the fuse he went down to the counter.

Q. Who went down, this man?

A. Yes.

Q. Had he touched the fuse before you left?

A. No, he says he was only getting the paper and the little wire ready.

Q. Heating this wire and getting the touch paper ready, is that what you mean (illustrating)?

A. Yes sir, and he went right away to the crosscut.

Q. Why did you leave?

A. He don't understand that word.

Q. What was the reason you left at that time?

A. He says he just left—he don't know whether he was to look in there.

Q. Was he afraid there was going to be any trouble there?

A. Yes he was afraid.

Q. What were you afraid of?

A. Why he was afraid to work in the gas."

Coupled with all this evidence taken verbatim from the testimony of plaintiff's witnesses is the statement of plaintiff's counsel: "We will show that if the system of ventilation had been perfect, if Righi had not assumed the risk he did in going into the known presence of gas, if he had not negligently failed to test for gas this accident would not have happened". (Transcript of Record, p. 79, l. 20 to 26). If we believe the evidence and listen to this frank statement there can be but one conclusion as to what was the proximate cause of the injury. It was Righi's failure to test for the gas. Had he done his duty, all the gas that could have accumulated would have been as harmless as the air we breathe. If we believe this testimony his failure was the *"sine quo non"* of this accident.

On this question of proximate cause the following authorities are in point:

In Bishop on Noncontract Law, paragraph 42, the rule is laid down as follows:

"If, after the cause in question has been in operation, some independent force comes in and produces an injury, not its natural or probable effect, the author of the cause is not responsible."

In *Clark vs. Wilmington etc. R. Co.,* 109 N. C. 430, 14 S. E. 43, 14 L. R. A. 749, the Supreme Court of North Carolina quoting Judge Cooley with approval, said:

"If the original wrong only becomes injurious in consequence of the intervention of some distinctly wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote."

In Wharton on Negligence, paragraph 134, the rule is stated as follows:

"Supposing that, had it not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? The question must be answered in the negative for the general reason that causal connection between negligence and damage is broken by the interposition of responsible human action. I am negligent on a particular subject matter as to which I am not contractually bound. Another person, moving independently, comes in and either negligently or maliciously so acts as to make my negli-

gence injurious to a third person. If so, the person so intervening acts as a nonconductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured."

See also *American Bridge Co. vs. Seeds,* 144 Fed. 605 and cases cited.

The plaintiff knew he could not fire the shots, because it was not safe to do so without first making a test for gas with a safety lamp. Despite the fact that he was being paid by the load he waited a whole half hour for the man to come with the safety lamp. When he came the plaintiff knew that there was gas in the breast and knew that since the brattice was not as close as it should be and no one had been working there for a half hour the breast was apt to be full of gas. Having this knowledge he plainly expressed his anxiety and warned the shot lighter to be careful—in other words to make a good test for gas—because there was no other way of being careful. He knew that the shot lighter had been absent for three hours and consequently could tell nothing of the conditions of the place without testing. He plainly saw no test was being made. He knew that when the test was not made the safeguard which the company had provided for his protection was not being used and yet he deliberately stood there and made no effort to get away from the danger, while his partner became afraid and ran to safety. The danger

of the explosion was plain, open and obvious to him —just as much so as it could be without actually happening. This is a simple case of the servant who knows that the master has provided a safeguard for his protection, and who knows that the safeguard had not been used. The safeguard in this case was the required test for gas. He frankly admits that he knew Righghi did not make this test. He knew the purpose of this test, and what would happen if the gas was present and when the test was not made the risk of staying there was open, obvious and apparent to him. Under such circumstances he plainly assumed that risk and cannot be heard to complain that he was injured. The case is identical in principal with one where a servant used a machine knowing that a guard intended to protect him has been left off. Even where the negligence is that of the master the law is plain upon the subject; In *Dresser vs. Employers Liability,* Vol. 1, page 540 the rule is laid down as follows:

"ASSUMPTION OF RISK BY CONTINUANCE AT WORK.

When, after entrance into the employment, an unforseen danger arises through the failure of the master to perform a duty owed to the servant by virtue of the relation existing between them, the latter, by continuing at work with knowledge and appreciation of the risk, as matter of law, bars his recovery for the resulting injury; and his recovery

is barred either on the ground of contributory negligence or voluntary consent to undertake the risk.

It is a rule, universally recognized, that when a person knowing and appreciating the dangers, and being free to encounter them or not, accepts employment where such dangers exist, he thereby waives any duty there may be in regard to them, and takes the risk of injury upon his own shoulders."

To like effect is the following statement taken from the opinion of the Supreme Court of the United States in the case of *Choctaw, O. & G. R. Co. vs. McDade,* Vol. 24, Supreme Court Reporter, page 25:

"Where a defect is known to the employee, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of knowledge and without objections without assuming the hazard incident to such a situation. In other words, if he knows of a defect, or it is so plainly observable that he may be presumed to know of it, and continues in the master's employ without objection, he is taken to have made his election to continue in the employ of the master, notwithstanding the defect, and, in such case, cannot recover."

See also Labatt, Master and Servant, First Edition, Vol. 1, page 639:

"A servant who, either before or after he commences the performance of the contract of employment, has ascertained, or ought, in the exercise of proper care, to have ascertained, that the ordinary hazards of his environment have been augmented

by abnormal conditions produced by the negligence of his master or of his master's representative, and has accepted or continued in the employment without making any objection and without receiving any promise that the abnormal conditions will be remedied, is deemed, as a matter of law, to have assumed the risk thus superadded, and to have waived any right which he might otherwise have had to claim an indemnity for injuries resulting from the existence of that risk."

The following statement of this Court in the case of *David vs. Trade Dollar Consolidated Mining Co.,* 117 Fed. p. 122, is very fitting to this case.

"The plaintiff in error while working in the tunnel had full knowledge of the danger from unexploded blasts and of all the means which were being employed to protect him therefrom. *HE ASSUMED THE RISK OF ANY DEFECT IF ANY DEFECT THERE WAS IN THE MEANS USED TO DETECT THE DANGER."*

That the presence of gas was but an ordinary danger incident to the employment is shown, first, by the admission of counsel when he says in his opening statement, "Now there is one great and ever present danger in coal mining. We will show that that danger is the presence of what is known by miners simply as gas." (Transcript of Record, p. 71, l. 8 to 11.) Second, by the testimony of the plaintiff himself when he says he knew the gas was there and was always coming through the coal. Third, by the fact that the gas tester was provided to protect against it. Being such an ordinary incident, and being known to the plaintiff it was but

one of the risks assumed by him in entering into and remaining in the employment. Indeed authorities need not be cited to uphold the doctrine that the servant assumes all the dangers which are ordinarily incident to the work in which he is engaged as well as assuming those dangers which being extraordinary are known to him or are so apparent that they should be known to him.

Furthermore it appears that the conditions of this breast were constantly changing as the work progressed. The plaintiff himself testified that he was constantly striking pockets of gas—the evidence showed that a blower was apt to occur at any time. These dangerous conditions attendant upon the progress of the work—whether they were due to the nature of the work or the act of servants engaged in the work are among the risks assumed by the employee. The rule is laid down in the case of *Moon Anchor Gold Mines vs. Hopkins,* 111 Fed. 298, where the Circuit Court of Appeals on page 303, quoting from *Finlayson vs. Milling Co.,* 67 Fed. 507, with approval said:

"It is the general rule that it is the duty of the master to exercise ordinary care to provide a reasonably safe place in which the servant may perform his service. * * * But this rule cannot be justly applied to cases in which the very work the servants are employed to do consists in making a dangerous place safe, or in constantly changing the character of the place for safety as the work progresses. The duty of the master does not extend to keeping such a place safe at every moment of

time as the work progresses. The servant assumes the ordinary risks and dangers of his employment that are known to him, and those that might be known to him by the exercise of ordinary care and foresight. When he engages in the work of making a place that is known to be dangerous safe, or in a work that in its progress necessarily changes the character for safety of the place in which it is performed as the work progresses, the hazard of the dangerous place and the increased hazard of the place made dangerous by the work are the ordinary and well known dangers of such place, and by his acceptance of the employment the servant necessarily assumes them."

See also *Gulf C. & S. F. Ry. Co. vs. Jackson,* 65 Fed. p. 48.

Cully vs. Northern Pac. Ry. Co., 35 Wash. 247.

II.—CONTRIBUTORY NEGLIGENCE.

If it was the grossest kind of criminal negligence for Righghi to fire this shot as stated by Counsel in his opening statement (Transcript of Record, p. 79), we submit that Brown standing by while Righghi prepared the light and fired the shots, with such knowledge as the evidence quoted shows he possessed, and especially knowing that Righghi had not tested for gas and knowing himself that gas was present and that it would be most apt to explode and was most apt to be a dangerous quantity if a flame was lighted in it, was also guilty of the

grossest kind of negligence, and that negligence directly contributed to his injury.

In the case of *Sommers vs. Carbon Hill Coal Company,* 97 Federal 337, subsequently affirmed by this court in 107 Federal 230, plaintiff was a miner working under the same conditions as Brown was in this case. It was his duty to tamp and fire his own shots. Before tamping he made a test for gas and found none. He then tamped the shots and took his tools out to the cross cut. Fifteen minutes after the time he made his test for gas he returned to the face and struck his match without testing again. Gas had accumulated in the meantime and blew up and injured him. In his opinion reported in 91 Fed. 337, Judge Hanford said:

"According to his own statement, it is plain that, if there was gas in the mine in a sufficient quantity to take fire from a lighted match, its presence would have been revealed to him before he lit the match, if he had observed his safety lamp. If the gas was there, and he was unaware of it, his ignorance was certainly due to his failure to observe his safety lamp. For him to light a match in a place where he knew that gas was liable at any time to come out of crevices and pockets in the coal—as he admits by his testimony that he did know—without observing his safety lamp, was a thoughtless and negligent act, which I can only compare to the act of a thoughtless person throwing a lighted match or a stump of a cigar into a keg of gunpowder."

We submit that if the conduct of the plaintiff in the case cited was a "thoughtless and negligent act" surely the same can be said of the plaintiff in the case at bar. Sommers knew that fifteen minutes before there was no gas—he made a test for it. Brown knew that the breast was gassy and a half an hour before there was gas, and knew that it would continue to gather, first because there was no commotion as when he was working in the breast, and second, because the brattice was defective according to his testimony. Sommers knew that gas of dangerous quantity could be detected by a safety lamp, and so did Brown. Sommers did not use his safety lamp. Brown knew that Rigghi did not use his and consequently that the proper means were not being used to ascertain the presence of gas. Sommers knew that gas was apt to ooze out of crevices, so did Brown. Sommers lit a match—Brown stood by and watched Rigghi light a fuse. Both open flames that would produce the same result. If Sommers, who did not know absolutely that gas was present, and he might be excused for his lack of knowledge, because he had tested fifteen minutes before was rightfully compared by Judge Hanford to one who throws a lighted cigar into a keg of gunpowder—to what then can the foolhardy act of Brown be compared? He knew that gas was there a half hour before and knew that it was bound to increase, and stood by while Rigghi lighted a flame in its presence.

With such knowledge of the surroundings and conditions it was clearly negligence for Brown to stay there without either inspecting himself or being assured that Righghi made such inspection. The rule is well stated in Labatt on Master and Servant, 1st Edition, Vol. 1, page 1162-3:

"It is well settled that a duty of inspection or inquiry is predicable whenever the character of the environment would suggest to a man of average prudence that there is a possibility or a probability of being injured in a certain way. Such possibility or probability is also frequently assumed to have been suggested with sufficient distinctness to show the servant that some further examination into the conditions was prudent, where he had observed circumstances or incidents which pointed to the existence of that particular danger to which his injury was traceable, and which were therefore to be regarded as carrying a definite cautionary or monitory significance."

See also *McKenna vs. Atlantic Refining Co.,* 75 Atlantic, page 1038.

See also *Cummings vs. Helena & L. Smelting and Reduction Company,* 68 Pacific, 852, where the Court said, on page 856: "By his own careless act in getting under the ledge without inspecting or sounding it he voluntarily exposed himself to the risk of injury. The accident would not have happened had the plaintiff exercised due care and caution. His failure in that respect was the immediate cause of the injury."

III. RIGGHI WAS A FELLOW SERVANT OF STANLEY BROWN.

The evidence shows that Righghi was a subordinate under a general superintendent—that he took

orders and was controlled by several men over him and was merely a superior servant of Brown, who during the night shift was engaged in performing certain details of the mining operation, and who under the direction of superior officers directed to a certain extent the work of the men inside. Brown himself testified that Righghi did not hire him, but that he was hired by the superintendent of the mine and then sent to a foreman who in turn sent him to work with Righghi.

Transcript of Record, p. 94, l. 29 to l. 4, p. 95.

Transcript of Record, p. 158, l. 14 to 21.

Transcript of Record, p. 162, l. 11 to 13.

Transcript of Record, p. 175, l. 4 to 11.

Transcript of Record, p. 177, l. 13 to 23.

Transcript of Record, p. 178, l. 31 to p. 180, l. 8.

Brown's duty was to mine the coal—to set and tamp the shots. Righghi's duty was to perform another detail of the mining, namely, to test for gas and fire the shots. Both were actually engaged in the physical labor that brought out the coal. Both were engaged in performing a detail of the work. If Righghi was negligent in the manner in which he fired the shots it was the negligence of a fellow servant. Righghi was not a manager or superintendent of any special department. He took orders

from the head fire boss who in turn took orders from Mr. Doll, the foreman, and all of these men were subject to the control of Mr. Christenson, the superintendent.

In the case of *Whelan vs. Alaska Treadwell Gold Min. Co.,* Volume 18, Sup. Ct. Reporter, p. 40, 168 U. S. 68, the plaintiff claimed that one Finley was a vice principal. The evidence shows that Finley was in charge of a gang of men down in the mine. That on the night of November 23rd, 1891, the plaintiff was sent by Finley, the boss in the pit, to the top of the chute, there to break rock and pound it fine enough to go through the chute, which connected with the tunnel through which the rock was shot into cars to be taken to the mill; that at the bottom of the chute was a gate, always closed until the chute was filled, and orders given to draw it; that Finley's custom was to come upon the top of the chute, to see if the rock was broken fine enough, and if it was all right to tell the men to come down as he was going to draw; and that at the time in question, after putting the plaintiff and others to work at the chute, he never gave them any notice that he was going to draw. * * * That its business was under the control of a general manager, and was divided into three departments,—the mine, the mill and the chlorination works—each of which departments had a foreman, or superintendent under the general manager; that the mine department had three shifts or gangs of workmen,—

two by day and one at night——and that Finley was boss of the one at night. There was conflicting evidence upon the question whether Finley had authority to engage and discharge the workmen under him.

In passing on the question of whether or not Finley was a fellow servant, the Supreme Court of the United States said:

"Finley was not a vice principal or representative of the corporation. He was not the general manager of its business, or the superintendent of any department of that business. But he was merely the foreman or boss of the particular gang of men to which the plaintiff belonged. Whether he had or had not authority to engage and discharge the men under him is immaterial. Even if he had such authority, he was none the less a fellow servant with them, employed in the same department of business, and under a common head. There was no evidence that he was an unsuitable person for his place, or that the machinery was imperfect or defective for its purpose. The negligence, if any, was his own negligence in using the machinery, or in giving orders to the men.

The case is governed by a series of recent decisions of this court, undistinguishable in their facts from this one." (citing many cases).

We submit that if Righghi was invested with the positive duties of the master so was Finley in the case just quoted. Righghi was to protect the place by testing for gas, Finley was to protect it by doing the drawing and by notifying the miners that he was about to draw. Both of these acts

were precautions used by the master for the safety of the men. If the negligence of Finley was that of a fellow servant so too was that of Rigghi.

In the case of *Quincy Mining Company vs. Kitts,* reported in 3 N. W. 239 in an opinion written by Judge Cooley, the Supreme Court of Michigan, held that a foreman to whom had been given the duty of inspecting timbers was a fellow servant of the miner and if he was negligent or failed to make such inspection the plaintiff could not recover. The Court said,

"In any such business there must be a division of employments among servants, one looks after one thing and one after another, but this each understands when he enters the service. He knows that his fellow-servants are to be charged with duties and responsibilities of differing natures and differing grades and he also knows that one of the necessary risks of the employment is that any one of them may be negligent and cause him injury. This risk he assumes," quoting *Lehigh Valley Coal Co. vs. Jones,* 86 Penn. 724, State 432; see also 89 Penn. 374.

See also *Consolidated Coal & Mining Co. vs. Clary's Admr.* (Ohio) 38 N. E. 610, which holds that one to whom the duty has been assigned of looking after the timbering of the mine is a fellow serevant of the miner.

In the case of *Davis vs. Trade Dollar Mining Company,* 117 Fed. 122, which was a case decided by this Court, the evidence showed that two shifts

of miners worked in a mine; when one shift would be about to stop work it would fire the blast and then the foreman of the outgoing shift would count the number of shots that were fired and tell the incoming shift the result of his count. In this case one shot missed, the foreman failed to tell the incoming shift and the plaintiff was injured by striking a blind blast. The plaintiff contended that the duty of keeping the place safe by keeping track of and notifying the incoming shift of blind shots was the master's positive duty and could not be delegated. This Court on the authority of *Whelan vs. Mining Company, supra,* held that the foreman was not a vice principal but a fellow servant. We submit that the duty of keeping track of and inspecting the number of the shots in that case cannot be distinguished from the duty of keeping track of and inspecting for gas in the case at bar. The presence of either rendered the place unsafe—they both were contingencies arising in the progress of the work—if the guarding against one was a positive duty so was the guarding against the other.

In the case of *Browne vs. King,* 100 Federal 561, the plaintiff was injured by the striking of a blind blast. It appeared in that case as it does in the case at bar, that the employer had made it his particular duty to have an inspection made for blind blasts and delegated a man for that purpose. It appeared that this man failed to make the inspection at this time, and it was contended that since

this inspection was the positive duty of the master —it could not be delegated—and the failure of the person delegated to inspect was therefore the failure of the master to provide a safe place. But the Court held that the person delegated to inspect was merely a fellow servant and said:

"But was it the positive duty of defendants to make inspections after each shot? Under the cases cited, we think not. The danger was temporary. It was a danger incident to the very work the plaintiff was employed to perform. Until, in the progress of the work, the 'missed shot' failed to explode, there was no danger. The danger therefore was one incident to the work, and the plaintiff had assumed all dangers or risks incident to the work when he entered the defendants' service, including any neglect of duty by his co-servant, Hanefin. The injury, therefore, did not flow from the failure of the defendants to discharge their duty, but from the neglect of the duty upon the part of a fellow servant, and it was a negligence, too, in which the plaintiff in this case knowingly participated."

In the case of *Johnson vs. What Cheer Coal Co.*, 56 Fed. 810, the Circuit Court of Appeals of the Eighth Circuit, reversing the District Court, held:

"A 'foreman' in a coal mine whose duty it is to direct 10 to 12 men what work to do, and to prop the roofs of rooms with timber; to inspect them, and to see if they are safe; and to drill holes in the face of the rooms, charge them with powder, and fire them,—but who is subject to the orders of the pit boss and the superintendent, is the fellow servant of a laborer under his direction, who is injured in performance of his duty of shoveling and removing coal and dirt, and assisting the foreman

in his work. *Railroad Co. vs. Baugh,* 13 Sup. Ct. Rep. 914, followed."

In the further course of opinion the Court said:

"Ford was one of 6 or 8 foremen, each of whom had the direction of the work of 8 or 10 men, and at the same time worked with them in the common employment of mining. All of these foremen were controlled by the pit boss, who directed the work underground for this corporation; and this boss was, in turn, subject to the direction and control of the superintendent, who seems to have been the general manager of the corporation. There were no distinct or separate departments in the operations of this defendant but the work of the pit boss, the foreman, and the men who worked with them, was homogeneous, and all directed to the common purpose of extracting the coal from the earth. Under the rule laid down in *Railroad Co. v. Baugh,* 13 Sup. Ct. Rep. 914, it is only the directors of the corporation, or the general superintendent, in whose hands they place the entire management of the corporation, that can be held to be vice principals, in a case of this kind, where there is no division of the business of the corporation into distinct departments, and the court below should have instructed the jury that the foreman Ford was not a vice principal of the defendant, but a fellow servant of the plaintiff."

See also *Westinghouse vs. Callaghan,* 155 Fed. 397, where it was held:

"The servant assumes the risk of the negligence of his superior fellow servant in the direction of the men and the work to the same extent that he assumes the risk of the negligence of the fellow laborer by his side who is engaged in performing the work."

"The duty of the master to exercise ordinary care to make and keep reasonably safe the place in which, and the machinery and appliances with which, his servants are at work, does not extend to cases in which the work which the servants are employed to do necessarily changes the character of the place or of the appliances as to safety as the work progresses. But the duty of care for the safety of the place and of the machinery and appliances in such cases devolves upon the servants to whom the work is intrusted."

We submit that both the work that was being done by Brown and his partner and the work that Rigghi was doing—under the evidence heretofore quoted—showing that conditions changed with the work—necessarily changed the character of the place as to safety.

See also *City of Minneapolis vs. Lundin,* 58 Fed. 525 and *American Bridge Co. vs. Seed, supra.* See also *Russell Creek Coal Co. vs. Wells,* 31 S. E. 614.

Counsel in the lower court relied upon the case of *Costa vs. The Pacific Coast Company,* reported in 26 Washington, 138, to sustain his position that the duty of inspecting for gas was the positive duty of the master and could not be delegated so as to relieve him of liability. In the first place this case is not in point in this Court for the reason that the State's decisions are not binding upon the Federal Courts upon the question of fellow servant and for the further reason that the

case of *Whelan vs. Mining Company,* heretofore cited, is the final decision of the Supreme Court of the United States upon this principle. In all the cases cited heretofore it would be seen that in the Federal Courts the duty of inspecting and keeping the place safe against conditions brought about by the progress of the work and by changes which result from the acts of the servants themselves, is not the positive duty of the master and may be delegated.

In the second place it will be seen that in the case of *Costa vs. The Pacific Coast Company* the Court based its decision upon a statute of the State of Washington, which was in force at that time and which read as follows (See Laws of 1891, Chap. 3, Sec. 9):

"The owner, agent, or operator of every coal mine, whether operated by shaft, slope, or drifts, shall provide and maintain in every coal mine a good and sufficient amount of ventilation for such persons as may be employed therein, the amount of air in circulation to be in no case less than one hundred (100) cubic feet for each person per minute, measured at the foot of the down cast, the same to be increased at the discretion of the inspector according to the character and extent of the workings or the amount of powder used in blasting, and said volume of air shall be forced and circulated to the face of every working place throughout the mine so that the said mine shall be free from standing powder smoke, and gases of every kind."

It will be seen that by this Statute there was no provision made for the manner in which gaseous

mines should be inspected but that the statute actually provided that the mine should be kept free from standing powder smoke, and gas of every kind, thereby placing upon the master the positive duty to keep the mine free from gas at all times and consequently placing upon him the positive duty to inspect for gas. But before the cause of action in the case at bar arose and after the decision in the case of *Costa vs. The Pacific Coast Company,* the Legislature for the purpose of remedying the evil of such a decision, changed the law so that it would read as follows: (Rem. & Bal. Anno. Code, Sec. 7381, Laws of 1897, p. 59, par. 4):

"The owner, agent, or operator of every coal mine, whether operated by shafts, slopes or drifts, shall provide in every coal mine a good and sufficient amount of ventilation for such persons and animals as may be employed therein, the amount of air in circulation to be in no case less than one hundred cubic feet per minute for each man, boy, horse or mule employed in said mine, and as much more as the inspector may direct, and said air must be made to circulate through the shafts, levels, stables and working places of each mine, and on the traveling roads to and from all such working places. Every mine shall be divided into districts or splits, and not more than seventy-five persons shall be employed at any one time in each district or split: Provided that where the inspector gives permission in writing a greater number than seventy-five men, but not to exceed one hundred men may be employed in each of said splits; Provided, also, that in all mines already developed, where, in the opinion of the mining inspector, the system of splitting the air cannot be adopted except at extraordinary and unreasonable expense,

such mine or mines will not be required to adopt said split air system, and the owner or operators of any coal mine shall have the right of appeal from any order requiring the air to be split, to the examining board provided for in section 7372, and said board shall, after investigation, confirm or revoke the orders of the mining inspector. Each district or split shall be ventilated by a separate and distinct current of air, conducted from the downcast through said district, and thence direct to the upcast. On all main roads where doors are required, they shall be so arranged that when one door is open the other shall remain closed, so that no air shall be diverted. In all mines where fire damp is generated, every working place shall be examined every morning with a safety lamp by a competent person, and a record of such examination shall be entered by the person making the same in a book to be kept at the mine for that purpose, and said book must always be produced for examination at the request of the inspector."

By this last act it will be seen that the only duty of inspection imposed by the statute and consequently the only duty of inspection required of the master was the duty to inspect the working place every morning, and the provision of the old law which required that the place should be kept free from standing gas was repealed. So that at the time this accident happened there was no positive duty imposed by statute of keeping the place free from any gas and no positive duty requiring any inspection except once a day in the morning. Since the alleged negligence which was the proximate cause of the injury in this case was not the failure to make this morning inspection but was the fail-

ure to make an inspection which was not required by statute, we submit that Rigghi, if he did fail to make this inspection which was not required by statute, his so doing was the act of a fellow servant and came within the principles announced by the decisions quoted herein.

IV. FAILURE TO VENTILATE.

As we have heretofore shown, the proximate cause of Brown's injury, if anything, was the failure of Rigghi to test for gas, but we also submit that the plaintiff has wholly failed to prove the allegation of his complaint wherein he alleges that the defendant did not sufficiently ventilate the mine. The evidence shows that in accordance with the statutory provisions the servants inspected the mine for gas that morning. (See Transcript of Record, p. 162, l. 16 to 18).

And the only evidence in the record on what the general ventilation was that night is the uncontradicted evidence of Mr. Mitchell on pages 169-170 and 171, Transcript of Record, and which is as follows:

"(Mr. Lea). Now Mr. Mitchell, if the ventilation is perfect, if there is a sufficient amount of air passing through the mine, would this gas be taken away in due course of time without danger?

A. Well, in cases of this kind it don't make any difference what current of air is travelling below, it has to be forced right to the face—by building this brattice it throws the air to the face so that it takes the return.

Q. How large a volume of air was passing through the mine when you made the test that day?

A. I could not tell you now.

Q. Did you make the test?

A. I seen there was a good current of air traveling through there."

together with the evidence of Mr. Pfeiffer, Mr. Lea's own witness (Transcript of Record, p. 134, l. 19 to 24), who testified as follows:

"Q. If the ventilation—if there is a sufficient volume of air being pumped into the mine, or drawn out, would you consider it in a safe condition if the brattice were from eight to ten feet from the face?

A. No, not necessarily."

Counsel relies upon the fact that since there was gas in the mine this was sufficient evidence of the failure to properly ventilate. This contention is made in the case of *Costa vs. The Pacific Coast Company,* 26 Washington, 138, wherein the Court said: "The fact that there was an accumulation

in Breast No. 11 is not in itself sufficient inference of negligence of the appellant''; and is further met by the evidence heretofore quoted and referred to, showing that pockets or blowers of gas are constantly being opened, and by the testimony of Brown himself who testified that when he was working in the breast the ventilation was sufficient.

As we have pointed out the new statute does not require positively that all gas should be removed but simply requires that a good and sufficient amount of ventilation should be provided, which is nothing more than the common law duty of furnishing a reasonably safe place in which to work. See *Costa vs. Pacific Coast Company, supra.*

V. STATEMENTS OF COUNSEL AS ADMISSIONS.

That the statements of counsel made in his opening ~~brief~~ statement are admissions against the interest of the plaintiff has been clearly established by the decisions of the Supreme Court of the United States and especially by the decision of the Supreme Court of the United States in the case of *Oscanyan vs. Winchester Repeating Arms Company,* reported in 13 Otto 261-278, 103 U. S. 261, book 26, L. C. P. Co. Supreme Court Reports, page 539.

So that not only are the statements of counsel for the plaintiff in this case to be regarded as evi-

dence and admissions against the interest of the plaintiff but also when the Court upon denying the Motion to Dismiss upon the opening statement of counsel instructed the jury as follows:

"Now gentlemen of the jury, you will understand that counsel has told you what his expectation is as to the evidence and it is for you to listen to the testimony and judge how fully or how completely the evidence sustains the statement, and decide the case on the testimony of the witnesses after you have heard it," he erred because by so doing he told the jury that they were not to pay any attention to the admissions of counsel but were merely to rely upon the witnesses' testimony. This we think is clearly a prejudicial error under the decisions.

VI. THE COURT ERRED IN GIVING INSTRUCTIONS TO THE JURY:

The Court gave the following instruction to the jury:

(a) "Now if there was any neglect on the part of the defendant corporation to provide for the ventilation of the mine in which the plaintiff was at work that is a breach of legal obligation which creates a legal liability to render compensation for the injury suffered."

It will be seen by this instruction that the Court instructed the jury that all that it was necessary to determine was whether or not the defendant was guilty of any neglect to provide for

ventilation. By such an instruction the Court simply told the jury that it did not make any difference whether this neglect was the proximate cause of the injury or not; and by such instruction the jury was told that the defendant was absolutely liable regardless of whether they thought its neglect in any way contributed to the injury or not. The evil of such an instruction will be realized when it is considered that there was testimony showing that the gas was very apt to come out in great blowers or pockets, and that it was the jury's duty to determine whether this gas accumulated because of such blower or whether it accumulated because of the defective ventilation. Under this instruction if the jury thought that the defendant had neglected in any way to ventilate said mine and yet at the same time thought the accumulation of gas was not due to this neglect or was due to a blower of gas accumulating still the jury would have to find against the defendant for the Court instructed them that the defendant was absolutely liable if it neglected in any way to prevent an accumulation of gas.

(b) By instruction No. 2 the Court instructed the jury as follows:

"You are instructed that the law requires that the owner, agent or operator of a coal mine must furnish not only a reasonably safe place in which to work, but also safe appliances, and this includes the timber required with which to provide and

maintain a good and sufficient ventilation to carry out dangerous gases."

It will be seen by such instruction that the Court instructed the jury that the master need only furnish a reasonably safe place for the employees to work, but that when he furnished appliances, these appliances must not only be reasonably safe but also safe, thereby telling the jury that as to appliances the master was an absolute insurer and his using reasonable diligence to furnish safe appliances was not enough. It will be seen that this instruction was prejudicial for the reason that there was testimony which went to show that the condition of the brattice although not absolutely safe was reasonably safe.

(c) By instruction No. 3 the Court instructed the jury as follows:

"You are instructed that the duty of inspection, prevention and removal of any accumulation of gas is imposed on the Coal Company. This duty is personal and cannot be delegated, and any person who for the Company was engaged in an employment having as part of his duties the duty of inspection, prevention and removal of any accumulation of gas is not a fellow servant of a coal miner with respect to the performance of that duty."

(d) By instruction No. 4 the Court instructed the jury as follows:

"Now, a man may be a fellow servant in the general operations of the coal mine but wherever

he is charged with the employer's specific duty of providing for ventilation and suitable means for making the operation of the mine safe, he is not a fellow servant in the performance of those duties.

"A coal company employing such person would be responsible for all damage caused by reason of negligence in the performance of his duties in the prevention, inspection and removal of any accumulation of gas.

"You are instructed that an employee of a coal company one of whose duties it is to test for gas in a coal mine is not a fellow servant with the coal miner so far as he is engaged in the performance of such duty."

By these instructions the Court made it the defendant's duty to prevent—and remove *ANY* accumulation of gas. It mattered not how small it might be—how long it stayed or of how long a duration —as long as there was any accumulation that was enough. Under these instructions if a blower or pocket of gas had suddenly opened up, and the evidence quoted herein shows that this is a thing that often hapepns, and Rigghi lighted the shot at that minute, or if the spark of the fuse had lighted a stream of gas coming out of the wall or gas gathered in a hole outside of the sweep of the air, as Rigghi testified in this case (Transcript of Record, p. 191, l. 26 to 32; also p. 195, l. 15 to 22). Under these instructions the master was absolutely liable regardless of the fact that he may have used the highest care. These instructions simply made

the defendant an absolute insurer against all explosions of gas and placed upon the employer a duty which he would be unable to fulfill.

Not only did these instructions place such an impossible burden upon the master, but they told the jury that once it became a part of an employee's duty in any way to prevent or remove an accumulation of gas that minute he became a vice principal and for his failure in preventing or removing *ANY* such accumulation the master was liable. Under these instructions every miner in the mine was a vice principal—for the evidence shows that brattices were for the purpose of preventing the gas from accumulating, and that these brattices were built by the miners themselves, as the work progressed. (Transcript of Record, p. 156, l. 1 to 20; also p. 138, l. 1 to 4.) The evidence of the defendant was overwhelming that there was plenty of timber to build the brattice, and that if it was not built it was because the miners whose duty it was to build it did not do so (Transcript of Record, p. 189, l. 29; also p. 198, l. 25; p. 175), one of these miners was Brown's partner. Therefore if the jury believed the defendant's testimony, and we have no right to say they did not, still under these instructions, they must still find for the plaintiff, because in failing to build this brattice Yeshon was a vice principal and the jury might have said his failure was the cause of the injury. Furthermore as we have pointed out herein before the law

of the State no longer requires that the face be kept "free from standing powder smoke, and gases of *EVERY KIND,*" consequently there is no longer this duty imposed upon the employer, he does not now as before have to "prevent any accumulation of gas," as it was held to be his duty to do by the Costa case in construing this statute. But in the place of this duty of keeping the mine free from "standing powder smoke, and gas of EVERY kind," the Statute has substituted a new duty that of inspecting once in the morning. By providing this duty it lays down the rule of care which it is incumbent upon the master to follow. Its terms supersede the former Statute and the common law also, and when the master lives up to its terms he does all that is required of him to do. By this enactment the Legislature has said: "By this test shall you be judged—did you inspect for gas once in the morning? If you did you have done what in our opinion is sufficient."

In the case of *Sommers vs. Carbon Hill Coal Company,* 107 Fed. 233, the lower Court was asked to give an instruction to the effect, that:

"It is the duty of the owner or operator of the mine to furnish a safe place in which the miners are to work."

The Court refused to do so, and this Court affirmed its action saying in part:

"The whole question of defendant's duty so far as safety as to ventilation in its mine was con-

cerned, is controlled by the Statute of the State of Washington which makes provision for ventilation in coal mines within the state by certain means and in a certain manner to prevent accumulation of gas. In instructing the jury the Court read that statute and was not required to do more. The Statute of Washington is in effect the measure of reasonable care which the owner or operator of a coal mine is required to take to avoid responsibility for injuries to workmen, arising from injuries of this character."

We submit that this decision settles the point that all the master need do is to obey the terms of the statute. The terms of this statute as it now exists are to inspect once in the morning. This was done in this case. The defendant performed its only positive duty by so doing. If it saw fit out of a superabundance of caution to make a test every time a shot was fired, in so doing it was not doing a positive duty—the man who did that inspecting was not a vice principal but a fellow servant performing a detail of the work.

By this Statute the Legislature recognized the impracticability of requiring a master to keep a place constantly free from gas, and therefore demanded one duty on the part of the master, namely, to see that the place is safe in the morning when the men go to work. The safety after that on account of the constantly changing conditions and the nature of the work is a thing which the servants assume, and when someone who has part of the work to do does it negligently and causes the

place to become unsafe, and fails to discover the unsafety, he is doing a mere detail of the work—he is performing a delegable duty of the master—he is a fellow servant, hence when the Court instructed the jury that Rigghi was performing an undelegable duty of the master in failing to inspect for gas, it instructed erroneously.

VII. MOTION FOR A NEW TRIAL.

The motion for a new trial in this case was based upon the contention that the affidavit filed by the defendant in support thereof disclosed newly discovered evidence, which if presented to the jury would materially alter the verdict and which evidence was newly discovered and could not have been produced at the trial by the exercisce of due diligence on the part of the defendant. The motion was further based upon the ground that the size of the verdict showed that its rendition was due to passion and prejudice on the part of the jury.

In the course of the trial the plaintiff Brown took the stand and testified that by the injury he was permanently disabled and rendered unfit to perform hard labor. That this permanent disablement was due to internal injuries which consisted of a broken rib and punctured lung. To substantiate this theory he swore:

(a) He was unable to go to work for five months after the injury because of his weak condition and because his hands were unfit to work with (Transcript of Record, p. 118, l. 3, also p. 92).

(b) That when he did go to work he only could remain there two months and had to quit because of the alleged internal injuries (Transcript of Record, p. 118, l. 14 and 15, also p. 92).

(c) That he on account of his injuries, remained idle three months. (See Transcript of Record, p. 92.)

(d) That he then went to work at Hoquiam in a saw mill where he remained two months and then left there and went to work *packing timbers* in a mine at Melmont where he worked fiftten days.

In the affidavits filed by the defendant on a motion for a new trial it was set up that Brown went back to work at Carbonado two months and twenty-two days after the accident; that he worked at Carbonado almost continuously until February 15, 1912. (Transcript of Record, p. 26.) Upon this showing the lower court intimated that if these were the facts and Brown had misrepresented the facts, that he would be disposed to grant the new trial.

Counsel for plaintiff said he was sure they were not the facts and asked the court to give him leave to show by affidavits that they were not. Those affidavits have been filed. We submit to this court that they are an open confession of perjury and fraud on the part of the plaintiff, for when coupled with the testimony of the plaintiff they show that he did work almost continuously as the defendant's affidavits charge, that he did not go to work five

months after he was injured but went back *washing dishes and doing porter work in a hotel* for $40 a month and his room and board (Transcript of Record, p. 30, l. 26-27; Transcript of Record, p. 92) which it is common knowledge is equivalent to $80 a month, the same work which he was doing for three months before he was hurt (Transcript of Record, p. 114) two months and twenty-two days after he was injured. They further show that Brown worked almost continuously after he was injured, not perhaps in the same place but in different places where the work was harder and the wages better than that place. They further show that Brown's testimony together with that of his partners, was to speak charitably, a sad narration of prearranged mistakes. They show that Brown was a healthy and as robust man after two months and twenty-two days as he ever was and especially as he was when he fainted in the mine before his injury (See Transcript of Record, p. 111) and that his claim of disabling internal injuries was a sham of the worst kind.

These facts are shown by the testimony of the plaintiff and his own affidavits filed in opposing this motion. In the first place it is conceded that Brown was not laid up five months for the injury occurred September 17, 1910, and Brown's own affidavits show that he went to work at Carbonado December 10, 1910, two months and twenty-two days after the injury (Transcript of Record, p. 51,

l. 23-25). Brown by his own testimony admits that the burns were healed up within five months after his injury. (Transcript of Record, p. 92, l. 11; see also p. 146, l. 23 to 29.) This would be by the time he left Carbonado. Again, it is conceded that Brown worked longer than two months as he testified to, for his own affidavits show he worked from December 10, 1910, to April 23, 1911—a period of four months and twenty-two days. (Transcript of Record, p. 51, l. 24-25.)

And again, the affidavits coupled with Brown's testimony show that he did not lay off three months on account of ill health, or for any other reason. Brown testified that after quitting Carbonado he worked two months at Hoquiam and fifteen days at Melmont (Transcript of Record, p. 92, l. 10 to 19.) Add this length of time to April 23rd and it brings you to July 8th. Brown's affidavits admit that he went to work again at Carbonado August 23, 1911, and staid there to February, 1912, just before the trial. (Transcript of Record, p. 51, l. 24-25.) That leaves just one month and fifteen days apparently unaccounted for in the period from December 10th to February, 1912. But even that period is accounted for. In counsel's opening statement there was an admission that Brown worked in a restaurant at Tacoma. There is no time that he could have worked there except during the month and one-half spoken of. Furthermore, much of that month and one-half can be accounted for

by figuring the time which Brown spent between jobs and traveling around and we submit that if the two months at Hoquiam were anywhere as long as the two at Carbonado between December 10th and April 23rd then we need look no further to find the apparent lay off for one month and a half. Furthermore, we call the court's attention to Samuel Worek's affidavit (Transcript of Record, p. 54, l. 20-21) in which he says that Brown when he quit April 23, 1911, immediately went away from Carbonado and that he did not see him for six or seven months—showing very clearly that Brown did not quit for ill health—if he had he would have laid around Carbonado with his tillikums as he has done ever since the trial, playing cards and haunting the saloon chairs. How then, did they arrive at these damages for those injuries? We submit, that it was because of Brown's continued misrepresentations and inaccuracies when he told how he was laid off five months, when he was only laid off two months and twenty-two days. Again, when he said he could only work two months (Transcript of Record, p. 119, l. 16) on account of his health when in fact he worked over four. Again when he said his health was such on account of his internal injuries, that he had to lay off three months (Transcript of Record, p. 92, l. 9)—when in fact he did not lay off at all. Surely a jury will give a man much larger damages whose condition prevents him from working five months, than one who is only laid off thereby two months and twenty-two days.

They will consider a man much more seriously injured who can only remain at work two months than one who can remain four months. They will consider a men permanently injured who after two months is forced by his health to lay off three when they will not so consider one who goes to work and stays there, even doing heavier work than he was accustomed to do before his injury.

That the alleged internal injuries are a sham; that Brown was as well a man after two months and twenty-two days as he was before, is amply proven by the testimony and his actions. He went to work in a hotel washing dishes and waiting on table and doing porter work (Transcript of Record, p. 26, also Transcript of Record, p. 92, l. 5 and 6) work which an invalid with blistered hands and punctured lungs would have a hard time doing for four months. He packed timbers and mined the same kind of work he was doing when injured (Transcript of Record, p. 92, l. 17 to 25), for fifteen days in the slope at Melmont. Timbers weigh between fifty and sixty pounds and it takes a pretty husky man to pack them up a slope for fifteen days.

Throughout the trial the plaintiff sought to impress, and from the size of the verdict, evidently did impress the jury with the permanent injuries to his lung, which injuries were according to him the cause of his physical breakdown. To these injuries he said the burns were nothing—they healed

up and soon were not felt, but the punctured lung remains even to this day and causes him to spit blood. It was because of this punctured lung that he received such a verdict at the hands of the jury. To our minds the punctured lung was an afterthought, and if the defendant is granted a new trial it will be able to show that it was. The men who were working alongside of him say in their evidence that they did not notice anything wrong with him. To them he was as healthy and well as he was when he worked with them before he was injured. None of them not even the doctor who treated him ever saw him spit blood (Transcript of Record, p. 140, l. 17 to 22; also p. 26 and 27).

The affidavits of the plaintiff himself and his own testimony show and admit that Brown's testimony at the trial was not the truth, and that the size of the verdict was excessively large because thereof and especially because of the pretended injuries.

That this evidence is newly discovered and that the defendant acted with diligence is amply set forth in the affidavits of the defendant in support of such motion. To further show that the defendant acted with diligence we submit that the court need only look at the complaint and it will see that the plaintiff only claimed $175.00 damages for wages at $3.00 per day. This would be just about two and a half months, or the length of time that Brown was actually laid up. Surely it was not incumbent

upon the defendant to anticipate that Brown was incapacitated for a longer time.

In the face of the allegation in the complaint claiming only $175.00 loss for wages which of course is the limit of the amount of recovery for this item, and in the face of the admission of Brown that he was only disabled for two and a half months and after that was able to again work packing timbers and to mine as he was doing before he was hurt, we submit that the verdict of $4,000.00 on a claim of $4675.00 was excessive.

We are not unaware of the rule which prevails in this court to the effect that the court will not review a ruling on a motion for a new trial. This rule is based upon the reasoning that such a ruling should be left to the discretion of the judge who heard the witnesses and conducted the trial (see *Doswell vs. DeLanzo,* 20 Howard 29) but the rule is not applied where there has been an abuse of discretion as we think there has been in this case, nor does it apply to a case like the one at bar where the judge who ruled upon the motion is not the same one who presided at the trial. Judge Hanford presided at the trial. Judge Howard ruled upon this motion. See *Pugh vs. Bluff City Ex Co.,* 177 Fed. 399. Also *McNichol vs. New York Life Ins. Co.,* 149 Fed. 141.

We respectfully submit the cause should be reversed and dismissed or that upon the failure so to do it should be sent back for a new trial.

Respectfully submitted,

FARRELL, KANE & STRATTON,
and
STANLEY J. PADDEN,

Attorneys for Plaintiffs in Error.

No.....

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC COAST COAL COMPANY, *Plaintiff in Error,*

vs.

STANLEY BROWN, *Defendant in Error.*

ERROR TO DISTRICT COURT OF W[illegible]ERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Hon. C. H. Hanford, C. W. Howard and Hon. E. E. Cushman, Judges.

Brief for Defendant in Error

STATEMENT OF CASE.

As plaintiff in error, who will hereafter be referred to as defendant to avoid confusion, neglected to make a satisfactory and correct statement of the facts, the same will here be supplied.

This is an action for personal injuries received September 17th, 1910, by an explosion of gas in defendant's mine at Black Diamond, Washington, at the sixth level, being about three thousand feet below the surface. (Transcript of Record, P. 81, L. 14-20.)

The day before the injury, which occurred five and a half days after his employment, he was sent by Righi, the fire boss, to breast No. 75 to work. At this level the pillar and room system of mining was in use. (P. 81, L. 26-28.) The problems of mining are twofold: 1st, excavation and transportation of coal; 2nd, ventilation to permit safe working at such depths. The latter problem is solved by the use of ventilating fans by which air is forced down into the bowels of the earth and along the points where the miners are engaged in work, the purpose being not only to furnish air for breathing, but to wash away gases which, mixed with the coal, are released by mining, and render the occupation hazardous by explosion rendered possible by the necessity of lights and blasting. (Pp. 130-131.)

The method of ventilation may be best illustrated by examination of the diagram which is an exhibit herein, the arrows representing the course of the air; but the method is not as simple as it appears, as the air has to be split into different courses. Gates are used to regulate the course and volume of air and diversion thereof.

It was the duty of Righi to direct all the mining operations of the plaintiff; to show him where to

work; to see that safe conditions were maintained in the sixth level; to see that the air was properly circulating through the level; that there was no accumulation of gases in the mine; and, on account of the great danger of igniting gases through the blasting, to test for gas and to discharge all blasts prepared by the miners (P. 82, L. 1-7; 189, L. 20-21) and to see that conditions were safe at the time of such discharge. He was the only representative of the mine supervising the work of these miners at the face, and the only person who had given plaintiff any orders. (P. 82, L. 16-21.) About fifty men were directly under his control. (P. 189, L. 22.)

The gas which caused the injuries is known as gas, but is fire damp, and is an odorless, colorless and tasteless gas (P. 131, L. 19, to P. 132, L. 13), and for practical purposes is discovered only by its effect upon a safety lamp used to test the conditions. The plaintiff was mining with a safety lamp, but not with the same accurate and sensitive kind as was carried by Righi. (P. 193, L. 23-32; P. 84, L. 3-16.) By means of such lamps a two per cent. solution of gas may be discovered, but a much higher percentage, i. e., five to eight per cent., is required to be considered dangerous. (P. 132, L. 18; 133, L. 23.) So the mere fact that there is a small amount of gas does not of itself denote great and immediate danger, and Brown knew this, as does any miner (P. 95, L. 28; 96, L. 6), the only danger being that of explosion, as the gas is harmless to the lungs. A small amount merely suggests extra caution may be required.

Plaintiff was working with his partner, Joe Yeshon, in breast No. 75, and upon returning to the face upon other occasions from lunch, etc., had noticed a small, but not dangerous, quantity of gas at the face. (P. 82, L. 23, to P. 83, L. 12.) The only way in which this gas may be removed is by a system of ventilation which mixes the gas with the air, making a solution of air and gas of low percentage, which then becomes non-combustible and non-explosive. (P. 132, L. 14-17.) Just before the injury plaintiff had undermined the coal at the breats about seven feet (P. 81, L. 30-32); his partner had drilled holes above the cavity and prepared the blast by inserting the explosives and fuse and tamping the same with clay. (P. 195, L. 11-12.) The brattice was eight to ten feet from the face, and the usual lengths of the brattive were six feet (P. 82, L. 8-13), so there was room for another brattice had timber been available, but the face was not so far from the end of the brattice as to be dangerous under ordinary conditions of air .(Pp. 134, 135.) As only Righi, as fire boss, was allowed to shoot the shots, plaintiff and his partner, upon completing the work for the shots, went to the cross-cut to eat their lunch, and about half an hour after they left the face Righi appeared and asked if their shots were ready and he was told that they were, and he instructed the miners to show the shots to him. (P. 82, L. 2-16.) This is customary and usual and necessary (P. 192, L. 17 ff.), as the face is often 18 feet across, as it then was (P. 82, L. 12), and the lamp carried by the fire boss gives a smaller amount

of light than is convenient to locate the same. Following Righi's instructions, plaintiff went to the face with his boss (P. 190, L. 14-18), but before going plaintiff informed Righi that at other times when going to the face he had found a small accumulation of gas. (P. 82, L. 23, to P. 83, L. 12.) Righi told him, "Never mind the gas," or "Gas is nothing," as testified to by Yeshon, who testified that Righi asked them to "Show me where the holes are"; after that Stanley told him that every time they go to work they find a little gas in it." (P. 123, L. 21.) Righi then said, "That is nothing that the gas is there." This reassured, the plaintiff then went to the face and showed Righi the fuse to the first shot. Brown and Yeshon testified that Righi did not make any test for gas, as the evidence showed should be done (P. 135, L. 21; 136, L. 6; P. 83, L. 13-14; P. 123, L. 28-32), while Righi claims he did make such test (P. 193, L. 14-26); but, if he did, it was so negligently made that he admits gas was not discovered, although it had accumulated (P. 194-195), with the result that as the fuse was lighted, and before there was opportunity to point out the other shots, for which purpose plaintiff was waiting (P. 88, L. 20-23), a spark from the fuse lighted the fire damp accumulated on the breast and an explosion occurred which threw the plaintiff on the ground against the brattice. (P. 85.) Yeshon, not being required to stay at the face, had returned to the cross-cut, and after the explosion occurred re-entered the breast and rescued the plaintiff, whom he found at the base of the brattice, a crumpled and

burned mass, before the explosion of the blast, which would have cost plaintiff's life. (P. 125, L. 23; 125, L. 18.) All exposed parts of the plaintiff were badly burned; his face and neck, both arms (one at the elbow and the other half way to the shoulder) and one side were all burned to such an extent that the skin was wrinkled up, blistered and fell off, even from the palms of the hands. (Pp. 89-95.) In being thrown down, a rib was broken or injured against an obstruction, and internal injuries were suffered, causing him to spit blood for a matter of about nine months and causing him great pain and suffering. Permanent internal injuries were received by the contusion upon the lungs or by the penetration of the broken rib, and, by reason of the contusion, adhesions took place between the pleura and the lungs, which lessened his breathing capacity and are a source of danger, pain and disease. (Pp. 139-158.)

For several months after the injury plaintiff was unable to work. He then obtained work at a waiter and porter at the hotel at Carbonado, Wash., at $40.00 per month, being compelled to quit on account of his health; he later obtained a job at Hoquiam, which he was compelled to quit for the same reason; later he worked at Melmont, but it was too heavy for the condition of his health; later working at the hotel at Carbonado until about three months before the trial, which work he quit for a like reason. (Pp. 118-119.) As a miner plaintiff would have been able to earn $3.60 to $3.80 per day, at union scale for day labor, and more at contract work. (P. 94, L. 9.)

This action was brought about five weeks after the injuries and before the full extent or severity of the injuries was fully known was removed to this court and was not brougt on for trial until twenty-one months after the injury. Twenty minutes after the case was submitted the jury rendered a verdict of $4,000 in favor of the plaintiff.

CLAIMS OF ACTIONABLE NEGLIGENCE.

Plaintiff urged liability upon three distinct claims of negligence, upon any one or more of which the jury were justified in rendering a verdict.

1. *That the company was negligent in not having a sufficient quantity of air circulating through the mine to prevent and wash away the ordinary and usual excretion of gas, such as had accumulated in breast No. 75.*

Testimony was offered showing that under ordinary conditions as then existed, if there had been sufficient air passing through the mine, such gas as had been released in the mining operations would have been washed away by the air current, but that, with an insufficient current, the gas would tend to accumulate near the roof, being lighter than the air. (113 S. of F., 24 to 114, L. 26.) The plaintiff was 3,000 feet below the surface in a pitch-black hole, and the conditions were naturally not only beyond his control, but the reason for the insufficient ventilation also was naturally beyond his knowledge, as his range of vision was a few feet ahead of his lamp. The defendant was under statutory and com-

mon law obligations to furnish ventilation sufficient to furnish a safe place in which to work. (Rem. & Bal. Code, Sec. 7381.) There was ample evidence that the defendant did not have a sufficient volume of air to wash out the gases constantly being released from the coal, a constant and known condition. The superintendent admitted that the mine was a medium gassy mine. The evidence showed that under the ordinary and proper conditions as to air there should be no accumulation of gas with the brattice but eight to ten feet from the face in the absence of blowers (P. 135, L. 13-18), yet defendant's superintendent admits that it did not pump a sufficient quantity of air through the mine to make safe mining eight to ten feet from the battice.

> "Q. You would not have it understood, would you, Mr. Hann, that the ventilation of the Black Diamond is so poor, that the volume of air being propelled through the mine is so insufficient that an accumulation of gas could take place within ten feet of the brattice, would you?
>
> A. Yes, sir; I certainly would.
>
> Q. You think that your ventilation is so insufficient that there would be an accumulation within ten feet from the brattice?
>
> A. Yes, sir." (183, L. 2-13.)

Despite this testimony of the superintendent, Righi testified that conditions are safe with the brattice fifteen feet from the face.

"A. To the face of the mine was about fifteen or eighteen feet.

Q. You knew that at the time?

A. Yes.

Q. And in your opinion it was safe?

A. In my opinion — every fire boss' opinion. (P. 194, L. 29, to 195, L. 2.)

The general poor condition as to ventilation was also shown by evidence that at other times the air current was not sufficient to prevent accumulations of gas on the face in the absence of the miners. (P. 123, L. 18-19; P. 99, L. 4-8; P. 124, L. 30-125, L. 2.) Knowing that a certain amount of gas was sure to be released by the mining operations, defendant was under duty to have such ventilation as would remove the usual and expected excretions of gas, which were constantly so large in this mine that the mine is called by the superintendent a gaseous mine. (P. 180, L. 16.) This was not provided for. It was shown that there was no blower, for if there had been one large enough to continue for half an hour it would have caused a general explosion and would not have been confined to one face. There was no greater excretion than should have been provided for, and with the brattice only eight to ten feet from the face the volume of air should have been sufficient to have prevented an accumulation under such normal conditions of excretion. The fact that the conditions were shown to be normal, and yet that there was an accumulation of gas, as is testified to by Mr. Pfieffer, an expert mining engineer

(P. 135, L. 13-20), is evidence that there was not a sufficient volume of air flowing at that time. Mr. Bucsko was of the same opinion. (P. 151, L. 18-31; P. 152, L. 21-32.)

2. *The next distinct claim of negligence was that the defendant company failed to furnish sufficient timber to enable the plaintiff to build another section of brattice, for which there was room, for ventilation purposes, and that plaintiff continued to work upon promise that such timber would be furnished.* (P. 86, L. 18-25.)

In this connection it should be noticed that while, as before shown, a distance of from eight to ten feet from the face to the brattice is not unusual, as the posts cannot be erected too close to the blast, and the posts are six feet apart; and it is not such as would ordinarily be dangerous under sufficient supply of air, and in fact Righi testified that fifteen feet was safe in his and every fire boss' opinion (P. 195, L. 2), nevertheless had this timber been furnished, and such brattice built, conditions might have been such as would have prevented the injury through the negligence of Righi, for, however negligent Righi might have been, plaintiff would not have been injured if there had not been gas to burn; and there would not have been gas with sufficient ventilation and brattice. In this connection it should be noticed that there was no incentive for the miners to mine the coal rather than to build brattice, as they were working by contract and received as great a proportion of pay for erecting brattice and brattice posts

as for excavating coal. (P. 120, L. 1-8.) Safe mining requires that the brattice should be brought as close as practicable, that is, to within five or six feet (P. 134, L. 13-18), or at least eight to ten feet (P. 136, L. 28 to 32). Defendant failed to provide the lumber required to erect another section of brattice (P. 103, L. 20, to 104, L. 4) upon request, but Righi promised to furnish it, and work was continued on such promise. (P. 89, L. 18-25.) Defendant offered no proof in rebuttal of this evidence.

3. *The third distinct claim of liability, being concurrent with the claims aforesaid, was the action of the fire boss, or gas tester, Ignish Righi, in igniting the fuse without making a test* (P. 83, L. 13-14; P. 123, L. 27-29) *to determine whether the air conditions and all other conditions were such as to render an explosion safe, which test usual and necessary precaution requires* (P. 135, L. 29; 136, L. 6), *which negligence of Righi was the direct cause of the explosion.*

The failure of the defendant to furnish proper ventilation and timber were concurrent causes, for whether the air had been pure or dangerously filled with gas, or whether the brattice was in a safe or unsafe condition, plaintiff would not have been injured had Righi performed his duties with due care. In the absence of a ventilating current, gas will accumulate in coal mines. (P. 137, L. 1-16.) Brattice eight to ten feet will usually serve the purpose with proper air. (P. 137.)

WAS PLAINTIFF GUILTY OF CONTRIBUTORY NEGLIGENCE, AND DID HE ASSUME THE RISK?

Plaintiff will try and follow the order of argument in defendant's opening brief and will consider as waived or unimportant those points not considered in such brief.

Defendant contends that plaintiff assumed the risk of the conditions of danger and that he was guilty of contributory negligence, but his whole argument and conclusion must fall because based upon false and incorrect statements of the evidence. Defendant bases his argument on contributory negligence and assumption of risk on three assumptions of fact (Brief, p. 9), no one of which is supported by the evidence:

(1) Instead of the evidence showing that Brown was "an old and experienced miner," as claimed, the fact is that it showed he is a poor, ignorant Polish boy whose personal appearance demonstrated he had only just arrived at majority. Two years of his boyhood he spent working in mines of Melmont, Roslyn and Pittsburg, and three years in the Carbonado mines; that was the extent of his experience. (P. 94, L. 16 to 29.) He had had no experience in gaseous mines, as he and his partner had not worked in such mines. (P. 124, L. 23-26.)

(2) He had not worked in breast No. 75 five days and a half, but worked part of the time on the pillar. (P. 95, L. 5-7.) The former was the total

time he worked for the defendant company. (P. 81, L. 14 to 24.)

(3) The defendant maintains that the plaintiff, knowing at the time that there was gas at the breast, went into the presence of such gas. There was absolutely no evidence to this effect, and the very portions of the testimony cited by the defendant disproves such fact if a few lines further of the record are read. The truth is that the evidence showed that plaintiff at the time he was injured did not *know* thert was an accumulation of gas in the breast, but that he did *suspect* such presence of gas, because on other occasions as he came to the face he had found gas in small quantities. (Plaintiff's testimony, P. 97, L. 10-15; P. 95, L. 19; 96, L. 6; P. 63, L. 27 ff.; P. 78, L. 25 ff.; P. 81, L. 17 ff.; P. 88, L. 11 ff.)

> "A. No, I don't see the gas that time; as soon as I get the hose (fuse) and everything ready I tell my partner, I say, 'We are going to our meal,' I don't see gas that time.
>
> Q. You said when you saw the fire boss you told him there was gas up in there and to look out, and he said there was no danger?
>
> A. Because any time I go down to the crosscut to my meal I don't shoot anything before that, not before that day, and after I go to the face and I look at the gas and find it many times the gas you see." (Bottom P. 98 to 99.)

The defendant, for reasons known only to itself, persists in an attempt to cause this court to believe

that the evidence showed that plaintiff voluntarily went into what was known to him to be extraordinarily dangerous conditions. While the opening statement of counsel may be somewhat ambiguous, an offer was made to explain the same before the ruling of the court on the motion to dismiss on the statement. (18 S. of F. ff.) "There is gas in there" means either that the coal is gassy, or that there is an accumulation in the air. This removes the ambiguity of the statement. Moreover, the statement was only an outline of the expected proof and is not evidence. An over-expectancy cannot stand as against the direct evidence. The defendant made repeated efforts throughout the trial to cause the plaintiff to say that he knew there was gas accumulated in the air upon the face when he left the work, and that he knew there was such accumulation when he returned to the face with Righi, and that he knew the great possibility of explosion. The plaintiff, however, never varied a scintilla from his claim and was corroborated by his partner. Not having worked in gaseous mines before, he was more cautious that he otherwise might have been, and from the fact that on other occasions when going to the face he had found indications of a little gas, he considered that Righi's attention should be called to such fact. A small amount of gas is always present and is not dangerous. (P. 96, L. 1.) A lamp test will disclose the presence of a two per cent. solution, but a five to ten per cent. solution is necessary to be explosive. (P. 132, L. 18-25.) Gas testers estimate the amount of gas by the shape of the

lamp flame, etc. (P. 183, L. 1-16.) The plaintiff had worked in this mine only five and a half days, and but four of these days in breast No. 75. His boss, Righi, was an old employee, whom he considered well acquainted with the conditions, and relied upon Righi's assurances of safety. (P. 83, L. 7-8; P. 109, L. 8-9.) As before stated, a small quantity does not necessarily imply dangerous conditions, but is a warning. He was not sufficiently aware of the dangers to disregard the assurance and set up his suspicion against Righi's knowledge and experience. "He is smarter than I am because he is boss, you know." (P. 109, L. 8.)

Defendant argues that plaintiff had no right to rely upon Righi in view of the fact that plaintiff's opportunity of observation was as good as Righi's and that he could see the conditions and dangers as well as his boss, but such an assumption is an absurdity in view of the evidence that fire damp is an *odorless*, *colorless* and *tasteless* gas, *having no effect upon the lungs*, and therefore could not be perceived in any way except by a test made with a safety lamp (P. 131, L. 19; 132, L. 13), and that, even if gas is discovered, a two per cent. solution is not explosive. Gas in small quantities is always present during mining operations in a gaseous mine. It is the duty of the boss to determine when the quantity is such as to constitute danger and to make all necessary tests. Knowing the conditions as Righi did, plaintiff had a right to assume that Righi knew his duty and was not heedlessly exposing the plaintiff to danger.

The doctrine of assumption of risk does not extend to where the danger is not as open and obvious to the servant as to the master. The fire boss was in a better situation to make accurate tests on account of being supplied with instruments to measure the flow of air and a delicate safety lamp for testing gas conditions, and, finding gas, could determine if it was in dangerous quantities. He had mining experience in that mine itself and was acquainted with gassy conditions and should know the dangers thereof, and when a test is or is not necessary. He had never made a test before blasting in the presence of Brown or Yeshon while they were working under him, and harm had not come before. (P. 83, L. 24.) It appeared that orders required such test (P. 172, L. 14 - 32), but it was not shown that Brown knew of such orders. It was nowhere shown or admitted that Brown was then aware that a test was then necessary and that the dangers of not doing so were appreciated by him. His experts supplied such evidence at the trial. If the conditions of brattice or of air were unsafe, all this should have been seen by Righi, who admitted his duties included such duties of inspection. (P. 189, L. 17-21; P. 190, L. 2-4.) During the trial defendant maintains that Righi was not negligent, that he had made the proper test for gas and had fully performed his duties in every way, and that canditions were safe and the accident was only an unavoidable casualty. (P. 192, L. 26 - 32). This tack having been unsuccessful, defendant now abandons his contentions, repudiates the

evidence offered tending to show there was no negligence, and contends that Righi's negligence was so gross, open and apparent that the plaintiff, as soon as he saw what was proposed to be done by Righi, not trusting to his boss to act safely in the matter, should have taken to his heels and run when he saw him about to light the fuse, although he was acting under Righi's orders in remaining to show the shots. Defendant now claims that this ignorant Polish boy, just past the age of 21 years, was guilty of contributory negligence in accepting the assurances of a boss who was sufficiently trusted by defendant to be given charge of the sixth level and had been their fire boss for three years (P. 189, L. 15). and especially when Righi, even at the trial, contended that conditions were then safe for blasting. This contention should have no further effect than to constitute an admission that Righi was negligent. Had the full dangers been apparent to Brown, he would not have continued work as he did. Not having worked in a gaseous mine, he was afraid until he was assured by one on whose judgment he had a right to rely that it was safe. The doctrine of assumption of risk cannot be extended to such facts. It must be remembered that there could not possibly have been an injury unless a high degree of heat had been brought in contact with the gas, and that the dangerous condition alone could not have caused the injuries but for the concurring negligence of the fire boss, the risk of whose negligence is non-delegatable duties is not assumed. No explosion could possibly have here occurred except

by ignition (P. 136, L. 14-23), and miners with perfect safety may go into the presence of fire damp if without a light. This is not true of poisonous gases formed in the mine by explosions, which gas is fatal, as it is carbon-monoxide, but is true of fire damp.

Furthermore, the defendant violated not only the common law obligation of failing to provide a safe place in which to work, but an express statutory obligation requiring sufficient ventilation, and it can hardly be contended that it would be public policy to permit a defense of assumption of risk where a statutory obligation has been violated. The statute upon which this action was in part based has been expressly interpreted by the Supreme Court of this State is a most instructive case, that of *Costa v. Pacific Coast Company*, 25 Wash. 138, the case being the one followed by Judge Hanford in the trial of this case, and directly applicable to the facts before the court. If there were contributory negligence and assumption of risk in the case at bar, much more so were there in that case, which is as follows:

Two old miners went into a mine to start work. The gas tester had written the word "Gas" as a notice of dangerous conditions at the breast and had then gone to get help to remove the gas. The old miners, nevertheless, went into the breast, and one of them, discovering gas, attempted to brush it away with his coat, the other, the plaintiff, standing by. An explosion occurred, and damages were given the plaintiff. In interpreting the law, the Court said:

"Our law (Bal. Code, Sec. 3165,) requires that every 'owner, agent or operator of every coal mine, whether operated by shaft, slopes, or drifts, shall provide in a coal mine a good and sufficient amount of ventilation for such persons as may be employed therein.' MANIFESTLY THE OBJECT OF THIS STATUTE IS TO PROVIDE A REASONABLY SAFE PLACE FOR MINERS AT WORK IN COAL MINES. But this duty is imposed by the common law. The rule is so well established in this jurisdiction as to require only the statement that the master must furnish a reasonably safe place and safe appliances for the servant. The miners were not allowed safety lamps in this instance, and depended wholly upon the gas tester for their knowledge. Of course, there would not be a proper circulation of air when gas existed in quantities. Yet the fact there was an accumulation in breast No. 11 is not of itself a sufficient inference of negligence of the appellant. But the duty of examination and inspection before the miners went to their work was imposed on appellant. This duty, it appears, was performed. The gas tester had knowledge of the accumulation of gas. Whether this duty was performed is, as has been observed, a disputed fact and one which the jury must have found adversely to the appellant. Negligence was then imputed to the appellant. We do not think the evidence was insufficient to sustain the imputation of

negligence. But it is urged on the part of appellant that the proximate cause of the injury to respondent was the act of Castrania in brushing away the gas with his coat, and that they were fellow servants. There are two aspects in which the acts of Castrania may be considered: One, that he had been directed himself to do this by the gas tester; and whether he was negligent in doing it, under the particular circumstances surrounding him at the time, and in view of the action of the gas tester and his direction, is a mixed question of law. The other phase is that if appellant had not allowed the accumulation of gas to remain in breast No. 11 after knowledge, and without proper warning and notice to keep the miners out of the mine with their open lamps, the accident would not have occurred. In other words, it is not clear that Castrania, if negligent as a matter of law, was the sole, direct, proximate cause of the accident; but his acts may be viewed, rather, as a concurring cause with the negligence of appellant. The rule seems to be that the negligence of a fellow servant does not excuse the master from liability to a co-srvant for an injury which would not have happened had the master performed his duty. *(Cone v. Delaware L. & W. R. R. Co.* 81 N. Y. 206, 37 Rep. 491; *Ellis v. New York, L. E. & W. R. R. Co.*, 95 N. Y. 546; *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493.)

> As has been suggested before, the duty of inspection, prevention and removal of any accumulation of gas is imposed on the coal company. This duty is personal, and cannot be delegated. The views of this court have been so frequently expressed upon the relation of coservants, and what relation constitutes fellow servants, that it is not deemed necessary to review the cases here. The gas tester, under the facts of this case, was not a fellow servant with the plaintiff. He was the representative of principal duties of the defendant. * * * "

As the Supreme Court of this State has interpreted the statute upon which this action is in part based in making the duty an absolute and undelegatable one, and the defendant was operating the mine under the laws of this State, it would be useless to cite cases from other courts, or to take time to point out the distinctions in the cases cited in defendant's brief. The case was decided in September, 1901, and *does* interpret the law of 1897. The laws of 1891, Chap. 3, Sec. 9, which defendant contends was the statute interpreted in that case, is not even mentioned.

All these cases cited by the defendant, however, are cases where the danger was actually apparent and was as apparent to the one person as to the other; or cases where conditions had rapidly changed, which is not the case here; or where the negligence was in the performance of a delegatable duty, or when the intervening human agency was a

third person, not an employee of defendant. There was no evidence of any sudden outburst or rush of gas, as in some of the cases cited, but there was merely the ordinary and usual excretion of gas released from the coal by the mining operations. Defendant argued to the jury, and Righi testified, that the gas came from one of the borings, but the theory was shattered and abandoned when cross-examination showed the hole was filled with clay (P. 195 L. 11 - 22). There was no proof whatever of a sudden or unusual change in conditions, but the opposite was shown. Work had ceased for half an hour, during which time the gas should have been entirely removed, if the air had circulated properly, but making conditions more dangerous with improper circulation. (P. 151, L. 18-31; P. 132, L. 28-32.) Conditions were not such that they could be perceived except by the use of a test lamp, except the condition of the brattice, and this was not dangerous in itself if the other air conditions had been proper. (P. 137, L. 1-6.)

If counsel was of the opinion that his interpretation of the statute was correct and that the interpretation given it by the Supreme Court of this State would not be followed by the United States Courts, one would think some effort would have been made to have shown compliance with the statute if the statute meant, as contended by the counsel: "By this test you shall be judged. Did you inspect for gas once in the morning? If you did, you have done what in our opinion is sufficient." Plaintiff's injury

having been proven by gas accumulation, if the defense is due care according to a standard fixed by the legislature, defendant should have proved compliance with that statutory standard. He should have proven that the air in circulation was *not less* than 100 cubic feet per minute for each person or animal in the mine, and as much more as the inspector had directed, as provided by that statute; that the air was made to circulate through the shafts and levels and working places; that the mine was divided into districts or splits of not more than 75 persons to a district, or not over 100 with permission of the inspector; he should also have shown that each district or split was ventilated by a separate and distinct current of air produced from the down-cast through said district and thence to the up-cast; he should also have shown that on all main roads the doors were so arranged that when one is open the other shall remain closed, so that no air shall be diverted; he should also have shown that a test was made of every working place each morning with a safety lamp by a competent person, and record of such examination entered by the person making the same in a book kept at the mine, which book must always be produced for examination at the request of the inspector. The defendant had knowledge of this law and of all of these facts. Its superintendent, foreman and other officers were present in court and could have testified relative to these matters, but no effort was made to have them do so. If such testimony was available and not produced, the jury had the right to draw the inference that the

evidence would not have been favorable. They knew the general construction and conditions. Brown, who had worked in but one part of the mine, and for but five days, and was provided with a light that would carry rays but a few feet, could not know them. If the doors were constructed to prevent diversions, it would have been an easy matter to have proven such fact. If a volume of air in no case less than 100 feet per minute for every person or animal in the mine was maintained, proof of this could have been obtained. It will be noticed that the statute says, "In no case less than 100," and does not specify the 100 feet shall be sufficient. Defendant has argued that the statute is intended to provide only against suffocation, because of such manner of specifying the quantity of air. The more the men and animals employed, the more coal will be mined, consequently the more gas will be released. The amount of gas released bears a direct ratio to the number of men and animals employed in the mine, hence that method is the only possible method of specifying the volume required for both purposes. Defendant even failed to show the volume of air for men and beasts that was furnished the morning of the injury, that the jury might judge of the sufficiency thereof. It even failed to show that any test whatever of the volume had been made, and counsel in his argument is compelled, in order to claim proof of compliance with the statute, to refer to the cross-examination of defendant's witness, Mitchell. Mitchell testified that he was a fire boss on the preceding shift; that there was a good current of air

flowing in the morning, but that he had made no test of the volume thereof, that day. (P. 169, L. 28; 170, L. 9.) If the statute sets an arbitrary standard of due care, a compliance therewith should have been shown, and not even a test having been shown that day, there was no compliance even to that extent. That the jury were properly instructed on both the questions of due care and assumption of risk is not denied by defendant, and no error was predicated thereon. The jury have found that he did not appreciate the dangers.

WAS RIGHI A FELLOW SERVANT OF STANLEY BROWN?

While Righi may have been a fellow servant in the performance of some duties, he was not while engaged in performing non-delegatable duties imposed by law on the master. This question has been definitely settled in the case of *Costa v. Pacific Coast Company*, heretofore cited and quoted above (26 Wash. 138.) To quote again from such case at bottom of page 142:

> "As has been suggested before, the duty of inspection, prevention, and removal of any accumulation of gas is imposed on the coal company. This duty is personal, and cannot be delegated. The views of this court have been so frequently expressed upon the relation of coservants, and what relation constitutes fellow servants, that it is not deemed necessary to review the cases here. The gas tster, under the

facts in this case, was not a fellow servant with the plaintiff. He was the representative of principal duties of the defendant."

It was in evidence that the Black Diamond mine is an enormous industry with about twelve levels, employing a great number of men, and so extensive that a number of men were required to perform the duties imposed upon the defendant by law and statute. Being a corporation, it could only act through human agency, and neither the superintendent nor any other one man would physically be able to personally bear all these burdens and perform all these duties. The defendant claims that Brown does not claim to have been hired by Righi. This is not true. It was testified to by Brown that Righi did hire him, he having first gone to the superintendent, who sent him to the inside foreman, who sent him to Righi, and through Righi the terms of his employment, the amount he should receive and the like, were settled. (P. 95, L. 1-2.) It was in evidence that Righi was the sole boss at the face of the mine (P. 82, L. 16-21), and Righi admits it was his duty to keep the sixth level of the mine in a safe condition. (P. 190, L. 2-4.) The trial judge, however, held that testimony as to the particular organization was immaterial (P. 179, L. 17-21), but that in the performance of duties required of the master, to furnish a safe place in which to work, or in the fulfilling of a statutory obligation, that such persons to whom such duties had been assigned were vice principals as far as the performance of such duty was concerned, ir-

respective of their position in the organization, the power to discharge, or any other matters. If this were not so, the common law and statutory obligations would be unenforceable, as it would always be possible for the master to delegate all such duties to inferiors and shield himself behind such inferiors in case of injuries. In view of an express decision of the Supreme Court of this State, under the laws of which the defendant was operating, that a gas tester in the performance of his duties as such is not a fellow servant with a miner, as he is performing non-delegatable duties imposed by law and statute upon the master, it would not be profitable to further discuss the cases cited by counsel.

The argument of counsel that under this construction every miner, including Yeshon, was a vice principal, and that the jury may have found he was the negligent party, as it was the duty of each miner to build his own brattice, seems too absurd for argument. All the miners did toward maintaining the brattice was to perform the manual labor required as directed by the fire boss (P. 153, L. 4-18; 158, L. 10-12; 167, L. 23-25), who admitted that the brattice construction was under his direction. There was no delegation of the duty to the miners. (P. 158,. L. 2-8.)

The question, however, of whether Righi was or was not a fellow servant is not of any particular importance, because of the fact that his negligence was only one of three claims of negligence, and even if he were a fellow servant and were negligent, his

concurrent negligence would not relieve the defendant of liability. *(Costa v. Pacific Coast Company*, 26 Wash. 138.) This instruction was given herein and no exception was taken thereto. There can be no question of the law on the matter, and the jury were properly instructed by the trial judge. The question is, in any event, like the question of assumption of risk and contributory negligence, a question of fact which has been passed upon by the jury.

STATEMENT OF COUNSEL AS ADMISSIONS.

Defendant claims prejudicial error because Judge Hanford at the close of plaintiff's opening statement, after denying a motion to dismiss thereon, told the jury that the statement was an outline of counsel's "expectations as to the evidence, and it is for you to listen to the testimony and judge how fully or how completely the evidence sustains the statement and decide the case on the testimony of the witnesses after you have heard it." The Court did not instruct as claimed that the jury could not consider the opening statement, but whether there was error or not is immaterial, as no exception was noted except to the denial of the motion, and no error was predicated thereon in the writ of error herein.

INSTRUCTIONS OF TRIAL JUDGE.

Defendant contends that the trial judge committed error in instructing the jury as follows:

> "Now, if there was any neglect on the part of the defendant corporation to provide for the ventilation of the mine in which the plaintiff

was at work, that is a breach of legal obligation which creates a legal liability to render compensation for the injury suffered."

He has quoted only a part of that instruction; the rest is as follows:

"That is an obligation which rests upon the employer to the extent that it cannot be delegated to someone else. I mean by that, the employer cannot say, 'I appointed my superintendent or my foreman to attend to that, and the failure to provide suitable ventilation is the failure of an employee, a fellow employee with the plaintiff.' The employer is not allowed to make that defense in regard to that particular duty and obligation. Whoever was placed in the position to see to the ventilation was the representative of the defendant corporation, and for the purpose of deciding the case is to be considered as the principal in the matter."

Error is claimed on the ground that such instructions would hold defendant liable even though such negligence was not the proximate cause of the injury or even contributed thereto. The question of proximate cause was covered fully in other instructions. This forced construction cannot be sustained. In any event, the instruction must be considered with the other instructions, where the questions of proximate cause, legal liability, due care, amount and burden of proof, etc., were thoroughly covered.

Defendant next contends that the following instruction is erroneous:

> "You are instructed that the law requires that the owner, agent or operator of a coal mine must furnish ont only a reasonably safe place in which to work, but also safe appliances, and this includes the timber required with which to provide and maintain a good and sufficient ventilation to carry out dangerous gases."

Error is claimed on the grounds that the jury were told that the master is an absolute insurer as to the safe appliances. The court made clear by the instructions as a whole that in no case was the defendant an insurer, but that it would only be held responsible for *negligence* in performing a *legal obligation*, both of which were clearly defined. Under the ordinary grammatical construction, "reasonably" would qualify not only "safe place," but would also qualify "safe appliances." Judge Hanford repeated the language of the Supreme Court in *Costa v. Pacific Coast Company*, 26 Wash., p. 141, line 20. However, the matter is of no importance, as liability was not claimed by reason of failure to furnish *safe* appliances. The only possible application of the instruction to the facts would be to the failure of the defendant to furnish timber with which to build brattice for ventilation purposes. No question was raised as to the *safety* of the appliances. No timber whatever, safe or unsafe, was furnished. The safety of the timber was not in issue.

The other instructions will be considered together, as was done by defendant:

"You are instructed that the duty of inspection, prevention and removal of any accumulation of gas is imposed on the Coal Company. This duty is personal and cannot be delegated, and any person who for the company was engaged in an employment having as part of his duties the duty of inspection, prevention and removal of any accumulation of gas is not a fellow servant of a coal miner with respect to the performance of that duty."

Now, a man may be a fellow servant in the general operations of the coal mine, but wherever he is charged with the employer's specified duty of providing for ventilation and suitable means for making the operation of the mine safe, he is not a fellow servant in the performance of those duties. A coal company employing such a person would be responsible for all damages caused by reason of negligence in the performance of his duties in the prevention, inspection and removal of any accumulation of gas.

You are instructed that an employee of a coal company one of whose duties it is to test for gas in a coal mine is not a fellow servant with the coal miner so far as he is engaged in the performance of such duty."

Defendant admits that these instructions would be proper under the laws of Washington of 1891,

Chap. 3, Sec. 9, which he quotes, but asserts that it is not true under the laws of 1897, being Section 7381 of Rem. & Bal. Code, and asserts that under the later act but one inspection a day is necessary, and that such statute changes the common law obligation of furnishing a safe place in which to work to the duty of seeing that each morning the mine is in a safe condition as to ventilation, and contends also that such statute is intended to provide for ventilation to prevent suffocation rather than to prevent explosions or furnish a safe place in which to work. In taking such contention defendant is taking a view just opposite to that adopted by the Supreme Court of the State of Washington in interpreting the identical statute which defendant asserts removes the common law obligation. The language used by Judge Hanford in two of the paragraphs is the exact language used by the Supreme Court of this State in the interpretation of this identical statute which the defendant now claims relieves the mine owner from his common law duties. This language was used in *Costa v. the Pacific Coast Company*, 25 Wash., at p. 142, decided in September, 1901, a matter of four years after the passage of the act which plaintiff contends was not construed in such case, but was passed after such decision. The Supreme Court of this State in interpreting such statute — and that its interpretation is binding upon the Federal Courts there can be no doubt — points out that here is no only the common law duty of furnishing a safe place in which to work, but that the statute referred to makes it a statutory duty as

well. To contend that a mine owner under the law may examine the mine in the morning and then during the course of the day shut down the machinery or allow it to be shut down so that there is little or no air passing through the mine, without warning the miners and without liability for its negligence or act, is reducing the argument of the defendant to an absurdity, yet such result must follow, and in this particular case it was shown that had there been sufficient quantity of air furnished through the mine this accident to the plaintiff would not have happened. The statue at most is a codification of or an addition to the common law duty of furnishing a safe place in which to work. The statute does not pretend to lay down a rule of due care to the effect that one inspection in the morning shall be sufficient, but imposes the obligation of making an inspection each morning and keeping a permanent record of the same for production for examination at the request of the State Mine Inspector. This particular inspection was under the statute not a rule of due care, but a duty imposed for the benefit of the State Inspector. The interpretation of the statute has never been disturbed by the Supreme Court, and if such interpretation had not been satisfactory to the legislature there have been many opportunities to have amended it. The statute has been very fully discussed heretofore in this brief.

Counsel contends that the instruction given, which is the exact language of the Supreme Court of the State of Washington, creates an absolute liability in making it the defendant's duty to prevent and

remove ANY accumulation of gas, and argues that the jury may have found that there was a blower, which due care could not provide against. The word "accumulation" has a definitely accepted meaning and involves a heaping up or massing, or increasing greatly. It involves the element of part of the mass remaining more or less stationary while the balance is added thereto. If there is a current of air moving, gas would not accumulate under the usual definition of the word, as it would pass along with the air. There might be a dangerous solution, but there would not be an accumulation thereof, even though there might have been evidence of a blower. Under this instruction there would not be the liability claimed. The court made it clear to the jury that the care required of the defendant was due care, *i. e.*, that the obligation is that of an ordinary prudent person in the exercise of care for his own safety. (P. 197, L. 28-30.) That instruction and others remove all doubt that the jury may have been misled.

Moreover, in criticising the instructions, defendant is applying the instructions, not to the proven facts, but to suppositions upon which there was no evidence. Nowhere in the record will be found any evidence that there was a blower. Yeshon and Brown both testified that there was no gas on the face when they left for lunch. Righi, the fire boss, said that he examined the conditions before firing the blast and found them safe. In other words, there was no blower. Mr. Pfeiffer and Mr. Bucsko both testified as to the possibility of blowers, and stated that they were detected by whistling or blowing

sound of the escaping gas. There is no evidence that the persons who were present heard any whistling sound, and they would have if a blower was struck; and both of these experts testified that had there been a blower the explosion would not have been confined to breast No. 75, but would have followed the air into other parts of the mine. This was admitted also by defendant's witness Mitchell. (P. 171, L. 12-30.) Consequently under no consideration could there have been prejudicial error if there were error at all. Defendant assumes in his brief that there was proof of rapidly changing conditions, and cites cases which have considered the liability under such circumstances. It was even asserted that Brown had encountered blowers while he was there at his work. This is untrue. None of the cited cases, therefore, are in point here, as there was no sudden changing conditions, no blower or opening of a cavity of gas. The fire boss came to the breast while the boys were working there and the request was made of him for timber shortly after they started to work that day. From the time the inspection was made the only change was to undermine at the base of the face about seven feet and bore three holes in the top and insert the explosives therein. From the time they quit work for lunch until the shots were fired there were no changing conditions whatever; the brattice was the same, the face was the same, and there had been no removal of coal. There was not even the opening up of a blower of such small size that ordinary care did not require ventilation sufficient to take care of the same.

The Sommers case, 97 Fed. 337, cited, would be more in point if Brown himself had struck the light which ignited the gas, having a full appreciation of the dangers.

MOTION FOR DIRECTED VERDICT.

In view of the fact that the Supreme Court of the United States in the case of *Slocum v. New York Life Insurance Co.*, being case No. 20, October term, 1912, decided April 21st, 1913, held that the seventh amendment to the constitution of the United States prohibits the enry of such judgment after verdict, by United States courts, whatever may be the state statutes, such error need not be further considered.

PETITION FOR A NEW TRIAL.

Defendant petitions for a new trial on the grounds among others of newly discovered evidence and excessive verdict. It being a rule of this Court that it will not review an order on a petition for a new trial on such grounds, it seems useless to more than touch on the points made.

In such petition defendant contends that the plaintiff had stated positively as true facts which were not true as to times and duration of his employment after his injury. It was shown to the trial court that such was not the case; that he did not testify positively; his answers were, "I don't know," "I think * * * " etc.; "I don't know how long I stayed there, about two months, something like that." He did not pretend to testify with mathe-

matical accuracy and showed he did not. The testimony was as follows:

"Where did you go to work first after that (meaning after injury); who did you go to work for?

A. Well, I don't know; I think Carbonado.

Q. How long was that after you were burned?

A. I think it was about five months.

Q. You did not try to get work any other place after you got burned until you came back to Carbonado; you did not go and ask for a job any place?

A. No, I guess not.

Q. You went back to Carbonado, and what did you do there?

A. I started waiting on the table.

Q. Working in the hotel?

A. Waiting on table.

Q. How long did you stay there?

A. I don't know how long I stayed there; I can't tell; about two months, something like that. (P. 117, L. 31, to 118, L. 15.)

Defendant had an opportunity to make investigation if he desired. The injury took place nearly two years before the trial and there was nothing to fix the exact time in plaintiff's mind. In deciding the motion, Judge Howard held:

"While it is doubtful if the evidence claimed to be newly discovered was of such material and non-cumulative character as to have materially

affected the amount of the verdict (it being confined to the physical condition of the plaintiff, and his employment and ability to work, between a period shortly subsequent to the time of his injury and prior to the trial of the cause, and not claimed to be offered for the purpose of defeating his right of recovery, but only as affecting the amount thereof), the court is unable to say that the defendant has established by a fair preponderance that the evidence claimed to be newly discovered was newly discovered, or could not with the exercise of reasonable diligence have been discovered and produced at the trial."

That the evidence was not newly discovered there can be no doubt. Defendant presented certain affidavits to the Court, and its agent, F. Greene, made affidavit as follows:

" * * * This affiant or the defendant company or its agents did not know or discover any of the persons whose affidavits accompany the petition for a new trial herein, except Dr. Allen, until after the rendition of the verdict in the above entitled case. Neither did this affiant, nor the defendant company or its agents, have knowledge of any persons who could testify as to the facts contained in said affidavits until after the rendition of said verdict. This affiant was unable to locate Dr. Allen until late in the trial, and at such time was only able to have a short conversation over the long distance

telephone with him. During such conversation Dr. Allen did not make known to this affiant the facts set forth in this affidavit, which accompanies the petition for a new trial herein, and the defendant or its agents had no knowledge thereof." (P. 22, L. 3-21.)

Greene also swore that neither he nor the company knew where Brown had been from the time he left Black Diamond after the injury until the trial. (P. 21, L. 17-25.) Plaintiff showed that every statement made in this affidavit was false, and instead of proving the allegations by a preponderance of the evidence, the evidence is overwhelming of such falsity. It was shown that Greene, far from not knowing before the verdict, of the witnesses, and of what they would testify, not only knew of such witnesses and their testimony, but actually talked with two of them, Dr. Allen and Mr. Moulton. Dr. Allen states (P. 52) that he told the full facts to Greene during the course of the trial; consequently, when Greene states he did not, one of the other is not telling the truth. More than this, it was shown by the affidavit of Mr. Moulton that those facts of length and time of employment upon which defendant now relies were actually known to them. Either the evidence was not considered of much importance or, more likely, was considered of more importance for the purpose of obtaining a new trial than to influence the verdict. Mr. Moulton in a counter-affidavit (P. 51) not only swears that he told defendant all about the record of Brown's employment as contained in

his original, but mistaken, affidavit, before the verdict, but swears he talked with Greene during the course of the trial, told him all such facts and states he was willing to testify had he been called.

Against Greene's assertion that he had no knowledge of the whereabouts of Brown from shortly after his injury to the time of the trial, are the affidavits of three persons, H. R. Lea, Stanley Brown and Erba L. Post. These three swear that Greene was told a week before the trial, in a conversation relative to compromise, fully as to where Brown had worked and how much he had received. All these matters are matters upon which there is small likelihood of mistake. Either Greene committed perjury in swearing he had no knowledge of such persons or evidence, or Dr. Allen, R. H. Moulton, Stanley Brown, Erba L. Post and H. R. Lea committed perjury. Moreover, that defendant had actual knowledge of all facts contained in the affidavit of John Collier is certain, for counsel cross-examined plaintiff fully on such facts, Collier being referred to as the foreman. (See Transcript of Record, P. 111, L. 7, to P. 114, L. 20.) This is especially significant because such cross-examination took place just after a two days' recess from Saturday noon until Monday noon, and was information apparently acquired at the same time Greene talked with Dr. Allen and Mr. Moulton. It was two weeks after this before the affidavits of these persons in support of the motion for a new trial were obtained.

Moreover, another of their witnesses, Samuel Worek, under oath states that Greene took advan-

tage of his inability to read English and placed in his affidavit statements which he not only did not make, but which were the opposite of those made.

Defendant also contends it did not have knowledge of the severity of the injuries, especially the claim of internal injury, and also of the time lost. If he did not, Brown, Lea and Post are committing perjury when they say he was told such facts a week before the trial, and Dr. Shannon, their own witness, was testifying falsely when he swore that at an examination in the presence of this same Greene, Brown told him the result of Dr. Brown's examination, his claim to internal injuries and the like. If defendant was not sufficiently apprised of the nature of the claim for injuries and lost time, it should have objected to the introduction of the evidence. No objection was made.

As actual knowledge of the witnesses and the nature of the testimony was shown to have been had before the verdict, the question of due diligence loses its importance. If such facts were not known, they should have been known. Twenty-two months expired between the time of the injury and the trial, and yet the only specific diligence alleged is that a letter was written to the State Mine Inspector requesting information of Brown's whereabouts. The "divers other persons" to whom letters were written were not named, and the expectation that the State official would act as defendant's private detective is hardly due diligence.

Greene was told a week before the trial the same story that Brown told on the stand. Also two days

elapsed during the course of the trial after plaintiff's direct evidence was completed. This was ample time for him to have verified the statement of Brown, and that it was sufficient time is demonstrated by the fact that such investigaion was made and the facts obtained.

Under this state of facts, it comes with poor grace from defendant to accuse Brown of perjury because he testified, "Don't know how long I stayed there, I can't tell, about two months, something like that," when they claim the actual time was four months.

The other matters contained in the affidavit are immaterial or cumulative, as pointed out in detail in the brief filed with Judge Howard. The assertion that $40.00 and board in a mining camp is equivalent to $80.00 is as absurd as many of the other deductions and inferences made by defendant. The facts are so well known that the Court should take judicial notice that a waiter in a hotel is furnished his board with wages, and that such board would not be worth more than $20 or $25 at the most.

CONCLUSION.

Plaintiff submits he has demonstrated that sufficient proof was offered to sustain the verdict upon three distinct claims of negligence: 1st, Failure to maintain general ventilation; 2nd, Failure to furnish timber with which local ventilation in breast No. 75 could be bettered; 3rd, Negligence on the part of the fire boss and vice principal in performing duties imposed on his master not only by common

law, but by statutory provision. The jury by their verdict have upheld each of these claims. It was a question of fact for the jury whether the plaintiff was guilty of contributory negligence, whether he assumed the dangers and whether he was injured solely by reason of the negligence of a fellow servant. The instruction as to concurrent negligence was not objected to. These defenses being affirmative defenses, the jury had a right to accept or reject evidence in support thereof. By the general verdict such defenses have been rejectd, and after hearing plaintiff's evidence and being satisfied therewith Judge Hanford refused a non-suit. After hearing the defendant's evidence he refused to direct a verdict. The jury were so well satisfied and unanimous that they were able to organize and bring in a verdict in about twenty minutes. Judge Howard after making a careful examination of the record is likewise convinced. In view of these circumstances, defendant is going rather far in his claim that there was no evidence to justify the verdict.

As to the amount of the verdict, as stated by Judge Howard:

> " * * * nor does it seriously contend for that portion of its petition for a new trial based on excessive damages appearing to have been given under the influence of passion or prejudice."

The complaint was drawn five weeks after the injury, before the seriousness of the injury was fully comprehended, at which time $175.00 in wages was

lost. No one who has ever heard or read the testimony of Dr. E. M. Brown (Pp. 139-148) and of the plaintiff could say that the amount fixed by the jury was so excessive or unreasonable as to be the result of passion, prejudice and sympathy, as the compensation was clearly not unreasonable. The question of the right to a new trial on the ground of excessive verdict and newly discovered evidence being a question within the discretion of the trial judge, his decision should not be disturbed, and the United States Supreme Court having held that the Circuit Court of Appeals has no jurisdiction to enter final judgment against the verdict of the jury, we submit that the verdict and judgment should stand.

Respectfully submitted,

H. R. LEA,
Attorney for Defendant in Error.

United States

Circuit Court of Appeals

For the Ninth Circuit

PACIFIC COAST COAL COMPANY,

Plaintiff in Error,

vs.

STANLEY BROWN,

Defendant in Error.

REPLY BRIEF OF PLAINTIFF IN ERROR

ASSUMPTION OF RISK.

Plaintiff's answer to defendant's charge that Brown assumed the risk of Rigghi's act and of the existing conditions can be plainly stated as follows: Brown suspected that the place was dangerous because of gas and told the shot lighter of his fears. The shot lighter assured him it was safe and Brown

because he knew the shot lighter was an experienced man relied upon this assurance, and put aside his fears.

The answer to this argument is: first, that the shot lighter did not assure him the place was safe —he told him "never mind the gas"—not that there was no gas there—but that it was there and not to mind it. Brown knew as well as the shot lighter that the gas was dangerous if it was there and the word of the shot lighter, could not convince him differently.

In the second place this exception that the servant has a right to rely upon the master's assurance is based upon the assumption that the master being better qualified because of his knowledge and experience to judge conditions, the servant has a right to rely upon that judgment. No such premise existed here. When Rigghi said "never mind the gas" he was down in the gang way—he had not been near the face for four hours and consequently Brown knew that he knew nothing whatever of the existing conditions at the face, for these conditions were constantly changing. Brown knew that whether or not gas was there in dangerous quantities was the only question to be determined. Brown knew Rigghi neither when he was in the gangway nor at the face could not judge this by his experience ,it was a cold fact which could be determined only in one way, that was by the use of a

safety lamp. All the experience of Rigghi served him nothing until he used that means of determining the fact. Plaintiff in his brief (page 17) admits this, when he says: * * * *"fire damp is an odorless, colorless and tasteless gas, having no effect upon the lungs, and therefore could not be perceived in any way except by a test made with a safety lamp."*

At the time Brown saw plainly that Rigghi did not use the safety lamp and consequently knew that Rigghi did not know any more about the conditions than he did. Brown testified as follows (P. 82-83, Transcript of Record):

> "Q. Did you know that there was enough gas in the mine, at the time you told him there was gas, to have caused this explosion?
>
> "A. Why, I tell him, I can't tell for sure —you can't tell for sure—just I know for sure there is a little gas all the time as soon as I go to the face. If you start to work, you know, you got to examine the mine first if you start to work, because if you got a safety lamp you go to the face slow and you can tell right away about the gas; and I watch myself, and I think he is the man, he is got some kind of experience, you know, before, and I tell him, that, and he going up to the face and he never look at anything. He just take that—some kind of touch paper and stick it in the wire."

And again on page 108, Transcript of Record:

> "Q. Yes, I will tell you, gentlemen, here is the safety lamp. Suppose the fire boss come to the face, you know, he got gas sometimes in the mine, you see, he got to go slow and look for the gas like that, and another time comes a blue light and it is in through the screen and if he get it slow down, and that gas all come out if you get it in here (showing), see, but if any come out here, if you stick it right there (showing) and it is gas and the explosion takes place you can get out quick—it is so slow, like this."

When Righghi went ahead to light the shot without making the test Brown knew that he was doing so without any superior knowledge to Brown. In other words, he knew Righghi's information was the same as his, and for all Brown knew the place might be full of gas. (Transcript of Record, p. 99, l. 1 to 30.) If Brown had lighted this fuse with his information he would have been taking his life in his hands, consequently when Righghi lighted the fuse, it was the same as if he had done it himself.

The evidence shows that as far as conditions could be determined without the safety lamp—Brown's knowledge thereof was far superior to Righghi's.

The law governing the exception to the doctrine of assumption of risk, in the case of an assurance of safety is plainly stated in the following cases:

In Chicago, B. & Q. R. Co. vs. Shalstrom, 195 Fed. 725, the Circuit Court of Appeals for the 8th Circuit says:

> "Assumption of risk rests upon the maxim 'Volenti non fit injuria' and upon the contract of employment. It rests upon the principle that no legal injury can be inflicted upon one who willingly assumes the known or obvious risk of it, and hence it includes the risk of known or obvious defects and dangers which the master or foreman directs the servant to incur during the employment, for the latter is as free to decline to obey such an order as he is to decline to take or to continue in the employment, and where he knows and appreciates the defect and danger as well as the master or the foreman, he becomes subject to the maxim, upon the willing no legal injury can be inflicted. The order or direction of the master, or of the foreman, to the servant to work at a specified place, or with certain appliances, does not release the servant from his assumption of the apparent risks and dangers of defects in the place, structure, or appliances that are known to him, or are 'so patent as to be readily observed by the reasonable use of his

senses, having in view his age, intelligence and experience." (Citing numerous cases.)

In the case of Toomey vs. Eureka Iron & Steel Works, 50 Northwestern, p. 850, the Court says on page 851:

> "The failure of plaintiff to produce such proof of negligence is not excused by showing that the foreman assured him that the frame was properly secured. Even if the foreman were the defendant's vice-principal, he could not bind the defendant by such a statement, if the danger were as apparent to plaintiff as to him. An employee assumes the risk when he voluntarily enters into danger apparent to him, notwithstanding an agent of his employer tells him there is no danger. An agent is not by the law clothed with power to make such representations, and bind his principal to respond in damages, if injury results.' "

In the case of Showalter vs. Fairbanks, Morse & Co., 60 Northwestern 257, the Court says:

> "Upon these facts we are clearly of opinion that the plaintiff must be held to have assumed the risk. He was of ordinary intelligence. He knew that trenches of this depth were liable to cave in. He knew that this very trench had just partially caved in at a distance of a few feet. He came out of the ditch because of that very

fact. He knew all the facts which the superintendent knew and had fully as much experience as the superintendent. No expert engineer could have given him any additional information as to the probability of the ditch caving in. In fact, he was fully informed of the peril, and chose to continue his work. No principle is better established than that under such circumstances the risk is assumed. Naylor vs. Railway Co., 53 Wis. 661, 11 N. W. 24; Johnson vs. Water Co., 77 Wis. 51, 45 N. W. 807; Paule vs. Mining Co., 80 Wis. 350, 50 N. W. 189. But it is said that the assurance of safety given by the superintendent, and the command to return to work, relieve the plaintiff of the consequences of his assumption of the risk. This is not the case where the employee is of full age and capacity, and knows the danger as fully as the superintendent. Toomey vs. Steel Works (Mich.), 50 N. W. 850; Linch vs. Manufacturing Co., 142 Mass. 206, 9 N. E. 728; Kean vs. Rolling Mills (Mich.), 33 N. W. 395; Bradshaw's Adm'r. vs. Railway Co. (Ky.), 21 S. W. 346. Plaintiff had the right to refuse to obey the order, and if he chose to obey he took the risk, of which he had full knowledge."

In the case of Kansas City S. Ry. Co. vs. Billingslea, 116 Fed. 335, the Court said:

"The plaintiff had no right to rely absolutely on the assurance of Murphy as to a plain, patent condition, when, in the discharge of his duty in assisting in cleaning up the dangerous yard, he had equal opportunities with Murphy in broad daylight to see and know whether obstructions had been removed or not. The plaintiff was an intelligent man according to his evidence, an expert, as to the condition of railroad yards and tracks, and he was bound to keep his eyes open, and give full use to his senses in regard to patent obstructions. Many of the cases cited supra sustain this proposition, but see Pennsylvania Co. vs. Ebaugh (Ind. Sup.), 53 N. E. 763; Barnard vs. Schrafft (Mass.), 46 N. E. 621; Railroad Co. vs. Herbert, 116 U. S. 655, 6 Sup. Ct. 590, 29 L. Ed. 755; Magee v. Railroad Co. (Iowa), 48 N. W. 92."

In the case of Republic Iron & Steel Co. vs. Thomasino, reported in 176 Federal, p. 49, statement of the case on page 51 is as follows:

"It was admitted by the plaintiff that Tony Thomasino's room was not properly propped, and that his death was due to that fact; but it was contended by the plaintiff that said Tony Thomasino had requested the defendant to furnish the necessary props, and it had failed to do so, and that upon such request the superin-

tendent had told him, in effect, to go ahead and do the work, he would send him timbers today —'The top is all right. Just as soon as I can I will send you props.' "

In passing upon the case on page 54 the Court spoke as follows:

"The undisputed evidence shows that the plaintiff's intestate was an experienced miner, that he knew of the necessity of propping his roof as he advanced further in his work and of the danger of its falling if not properly supported, and that when he went to work the morning of his death, he, with his assistant, examined the roof and it seemed all right. From this it is clear that, in continuing his mining and extending his room without propping the plaintiff's intestate well knew and appreciated the danger, and he assumed the risk, and plaintiff cannot recover although the defendant neglected to furnish the necessary props (see Sloss Iron & Steel Co. v. Knowles, 129 Ala. 414, 30 South. 584) unless the plaintiff's intestate had a right to rely upon the mine foreman's promise to furnish props and his assurance as to safety. This is not a case of a master's furnishing a defective appliance or place which he promises to have repaired or made safe, but is rather a case where assurance of safety was given to the servant who was

making his own place to work which he knew as well as any one could know would be and was dangerous without using the appliances the master promised to furnish (and he knew that the master had not furnished them) and he well knew that in continuing to work therein he was in danger and was increasing the danger with every stroke of his pick, for he was an experienced miner and well know of the necessity of propping his roof as he advanced. Surely, under these circumstances, the plaintiff's intestate had no right to rely on the promise to furnish props whether the furnishing was to be 'to-day,' 'to-morrow,' or after a while as soon as I can.' "

"And we think it equally clear under the plaintiff's evidence most favorably considered, that the plaintiff's intestate had no right to rely upon the foreman's assurances that: 'The top is all right.' 'Never mind, you go ahead. The top is all right,' because he was not only an experienced miner, but, as to the actual situation at the time the alleged assurance was given he knew more about the situation than the foreman did, for he knew, and there is no suggestion in the evidence that the foreman knew, that he had already mined two or three days extending his roof (10 to 12 feet according to the average) without setting props, thus increasing the ordinary danger."

CONTRIBUTORY NEGLIGENCE.

Under this head we submit that both by counsel's oral argument and plaintiff's brief it affirmatively appears that Brown exercised no care whatever for his safety. The evidence quoted before shows that he knew gas was most apt to be present after an absence of one-half an hour. He knew that only by one means was this presence to be determined, i. e. the inspection by the safety lamp. That the master had required him to wait until this means had been used. Yet he stood by knowing that the means of safety which the master had provided was not being used. He used no care whatever to protect himself. Brown made no effort to inspect himself or to force Righghi to inspect—neither did he get out of the way as his partner did.

That it is the duty of the servant to use care for his own protection—care proportionate to the danger in which he works—is well established. In Smith vs. Hecla Mining Co., 38 Wash. at p. 460 the Court said:

> "But the very conditions of danger which impose the duty of careful inspection upon the master also impose a corresponding duty of care upon the servant.
>
> "The master has the right to suppose that the servant will be alert, and observe that diligence to detect and avoid dangers which a man

of ordinary prudence would exercise for self-preservation, under like conditions."

See also Creed United Mines vs. Hawman, 127 Pac. 925 (See Vol. 2, p. 929).

FELLOW SERVANT.

Plaintiff has made no attempt to distinguish the cases cited from the Federal and Supreme Courts in our opening brief upon this point. He relies entirely upon the case of Costa vs. Pacific Coast Company as being an interpretation of the law of the State of Washington and says that that case lays down the rule that the duty of inspecting for gas at any time is undelegable and whoever is delegated to make any such inspection is a vice principal. A careful reading of that case will reveal the fact that it was not the failure to inspect for gas—as a matter of fact an inspection had been made—but a failure to warn the servants after the gas had been found, that caused the injury. Hence what was said was mere obiter dicta. Furthermore a glance at the facts of that case will show that the miners had been out of the place all night and had just come to work in the morning. The Statute of this State expressly requires:

"In all mines where fire damp is generated, every working place shall be examined every

morning with a safety lamp by a competent person, and a record of such examination shall be entered by the person making the same in a book to be kept at the mine for that purpose, and said book must always be produced for examination at the request of the inspector."

So that it is plain that the inspection under consideration in that case was the inspection which the statute expressly requires to be made "every morning", and not such inspection as is under consideration in the case at bar, i. e. an inspection to be made before the firing of the shots, provided for because of the extra precaution of the master and not by any statute.

So that when the Court said "The gas tester UNDER THE FACTS IN THIS CASE was not a fellow servant of the plaintiff," it merely meant to say that where the statute expressly requires an inspection to be made "every morning," that was a non-delegable duty—and he who performed it was a vice-principal. Neither by its words nor intendment can it be interpreted to say that the act of inspecting before firing the shots, which act is required not by any statute but merely as an extra precautionary measure of the master is a non-delegable duty. If that case can be said to mean what the plaintiff here says it does, then in so doing it is not interpreting the State statute—for nowhere does the Statute require that the inspection shall

be made before firing the shots, but its only requirement is that an inspection be made "every morning". If that case means to say that the person who makes inspection before firing the shots is a vice principal, in so doing it is only announcing the general principle of the common law as to who is and who is not to be considered a fellow servant in the State courts. That such an announcement cannot be followed by this Court is plain because the Supreme Court of the United States in the case of Whelan vs. Treadwell Mining Co. (supra) has laid down a different rule and such rule has been followed by this and the other Federal Courts as shown by our opening brief. Plaintiff has failed to distinguish the cases cited in our opening brief —the case from the State Court relied upon is not in point, hence it follows that Rigghi was a fellow servant of Brown and the plaintiff cannot recover for his negligent acts.

In the case of Hughes vs. Oregon Imp. Co., 20 Wash. 294, where there was no question of violating a statutory duty involved, the Supreme Court of Washington, at page 299, held that a fire boss—and pit boss—such as Rigghi, were fellow servants with the miner.

In our opening brief we contended that the State Statute set the measure of care required of the defendant and that he need only comply with its terms "that required an inspection every morning."

We beg to call the attention of the Court to a recent decision of the Supreme Court of the State of Washington, Dollar vs. Northwestern Imp. Co., 129 Pac. 578, decided January 25, 1913, which upholds us in our contention.

In that case the complaint in substance alleged that the defendant had not furnished the plaintiff with a safety lamp and was consequently guilty of negligence. The Statute of the State of Washington lays down where and under what conditions a safety lamp shall be furnished. The Court found that those conditions were not proven to exist by the evidence, and said:

> "The question then arises, Did the defendant fail to furnish the plaintiff with a safety lamp as required by the statute? The measure of the appellant's duty is the statute. This Court, in Delaski vs. Northwestern Improvement Co., 61 Wash. 255, 261, 112 Pac. 341, 344, said: 'The provisions of the statute measures the respondent's duty. The Legislature, in recognition of the hazards of working in coal mines, has made careful provisions for their inspection and imposed imperative duties upon those who own and operate them. The purpose of the law is to provide a reasonably safe place for the men to work. A failure to observe these provisions is negligence per se.' "

From this statement and the holding of this Court in Sommers vs. Carbon Hill Coal Co., cited in our opening brief it is plain to our mind that once the defendant has performed his statutory duty he need do no more. Hence when the defendant inspected in the morning it was under no positive obligation to do more and hence the act of inspecting at other times was a delegable one, and the person doing it was a fellow servant. To this effect see:

Waddell vs. Simonson, 4 Atlantic 725.

Holly vs. McDowell Coal & Coke Co., 203 Fed. 668.

FAILURE TO VENTILATE.

On page 25 of his brief counsel for plaintiff says that because the defendant did not prove the amount of air that was circulating at the time of the explosion, "the jury had the right to draw the inference that the evidence would not have been favorable", and again, "If the volume of air in no case less than 100 feet per minute for every person or animal in the mine was maintained, proof of this could have been obtained." In other words counsel answers our argument that he failed to prove lack of ventilation by saying that it was our duty to prove we did ventilate. A mere statement

of this contention is sufficient. When the plaintiff alleges negligence in failure to ventilate it is encumbent upon him to prove such negligence. It is not the duty of the defendant to prove freedom from negligence. In these matters the burden of proof is upon the plaintiff. There is no competent evidence whatever of the failure to ventilate. The fact of the explosion is not evidence of this fact. (Dollar vs. Northwestern Imp. Co., supra). That the testimony of the plaintiff's witnesses to the effect that had there been sufficient ventilation there would have been no accumulation is no evidence of failure to ventilate is held squarely by the Supreme Court of Washington in its last interpretation of this mining statute, Dollar vs. Northwestern Imp. Co., supra, decided January 25, 1913. By that case it was held squarely that the plaintiff must prove a breach of the statutory requirements before the defendant could be held for failure to ventilate. After citing the statute in this case the Court said:

> "It will be noticed that this section of the statute required: (1) That every coal mine shall have a good and sufficient ventilation; (2) the amount of air; and (3) that the air must be made to circulate. A careful reading of the record in this case demonstrates that there is no evidence supporting any of the above allegations of negligence in the complaint, or showing that the section of the statute above referred

to had not been complied with, unless the answer of the respondent to a single question propounded to him by his counsel can be construed as evidence of negligence or of the neglect of duty imposed by the statute.

On direct examination he testified, in effect, that, if there had been enough air, the gas would not have remained in the chute where he was working. This is not evidence of a fact, but is a mere conclusion, and does not even specify the amount of air which the witness would deem sufficient for the purpose. *The amount of air necessary cannot be measured by the judgment of the witness, but must be determined by the requirements of the statute.* We think this evidence is not sufficient to send the case to the jury upon any of the above allegations of negligence, or upon a failure to comply with the prescribed statutory duty."

In the case at bar the plaintiff has failed to prove how much air was circulating—or that the defendant was not complying with the terms of the statute. We submit he has failed in his proof.

INSTRUCTIONS TO JURY.

The case last cited shows clearly that the Court erred when it instructed the jury that the "duty of

inspecting, preventing and removing ANY ACCUMULATION OF GAS is imposed upon the Coal Company." In the last cited case there was an explosion of gas, consequently there must have been an accumulation of gas—but the Court held that before the defendant could be held it must be shown that the statutory requirements as to ventilation were violated. In other words, if the defendant had done what was required of it by the statute and after so doing the gas accumulated and exploded the defendant was not liable for it.

We respectfully submit that the judgment should be reversed and the case dismissed.

FARRELL, KANE & STRATTON,
STANLEY J. PADDEN,
Attorneys for Plaintiff in Error.

No. 2275.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC COAST COAL COMPANY, *Plaintiff in Error,*

vs.

STANLEY BROWN, *Defendant in Error.*

ERROR TO DISTRICT COURT OF WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Hon. C. H. Hanford, C. W. Howard and Hon. E. E. Cushman, Judges.

Petition of Defendant in Error for Rehearing

To the Honorable Circuit Judges:

Comes now defendant in error and respectfully petitions for a rehearing, upon the ground that the Court has been mislead by the brief of plaintiff in error as to the statutory law of Washington at the time of the decision in the case of *Costa vs. Pacific Coast Company*, 26 Wash. 138, which decision estab-

lished the interpretation of the State statutes governing the case at bar instead of an old repealed statute as held in the decision herein.

Petitioner submits that this Court erred in holding that the statute now in force in this state was *not* interpreted by the Supreme Court of the State of Washington in the Costa case, and in holding that, by such statute, it was not made the *statutory* duty of the defendant to maintain a good and sufficient ventilation, and to prevent any accumulation of gas in the mine. It seems to be conceded in the decision herein that if the Costa case were still law, that judgment herein would have been affirmed.

Defendant in error asserted, on page 46 of its brief, that it was the Law of 1891, Chapter 3, Sec. 9, that was construed by the Washington Supreme Court in such case, and not the statutory law now in force, which he asserts on page 47 of his brief was passed by the legislature to remedy the evils of the Costa decision, and by such assertions has misled this Court into accepting such statement as a fact, and this Court, relying upon such statements, has so held, when, as a matter of truth and fact, the case of *Costa vs. Pacific Coast Company* was an interpretation of the law now in force in the State of Washington governing the case at bar. On page 141 of the Court's decision in that case the Court specifically says that it is interpreting Bal. Code, Sec. 3165, which is the law of 1897, and which is the present law of the State of Washington, Rem. & Bal. Code,

Sec. 7381. This Court is, therefore, unknowingly making an unfortunate error in its statement on page 6 of the decision, after upholding the law of the Costa case:

> "There was then, therefore, in the State a statute expressly requiring all such mines in the State to be kept free from gas of every kind, which imposed upon the operator thereof the imperative duty of complying with the law. But that statute was subsequently changed by the Legislature of the State of Washington, and at the time the present case arose the statute of the State provided as follows:"

This is an incorrect statement of fact if "then" refers to the time of the Costa case. Furthermore, the Court is in error in its reference to the law as the law of 1901. This was undoubtedly an oversight, as the law referred to was the law of 1891, not 1901. The legislature was apparently satisfied with the interpretation given by the State Courts to the statute, for it has never been changed and *the statute has, since the Costa decision, been construed numerous times, in accordance with such decision,* and is the law of the State at the present time.

Not only has there been a lapse of 17 years since the present law was passed, and a lapse of 13 years since the Supreme Court interpreted this act as making it a mandatory and statutory duty of the mine owner to furnish good and sufficient ventilation, and to prevent any accumulation of gas in the

workings, etc., but the State Legislature has met seven times since this interpretation was given by the State Supreme Court, and had this interpretation not been the legislative intent and desire, the law would have been changed.

Not only this, but the State Supreme Court has many times affirmed the same interpretation that was placed upon this statute in the Costa case. Plaintiff in error did not consider it necessary to cite these cases in his former brief on account of the leading case being considered by him a full and complete interpretation of the statute which would be accepted by this Court without question on account of such construction having been made by the highest court of the state, and he particularly relied on the Costa case because that was the case relied on by the trial judge, Hon. C. H. Hanford, who, in giving the instructions now held erroneous, *used the exact language and substance of that decision*, and because the facts were so similar to those in the case at bar.

An equally strong case is that of *Czarecki vs. Seattle & S. F. Ry. & Nav. Co.*, 30 Wash. 288, 70 Pac. 750, decided Nov. 8th, 1902, where this statute was again interpreted, at page 289 thereof:

> "In giving instruction No. 4 the Court quoted the statute (Sec. 3165, Bal. Code), as follows:
>
> "The owner, agent or operator of every coal mine, whether operated by shafts, slopes or drifts, shall provide in every coal mine a good and sufficient *amount* of ventilation for such

persons and animals as may be employed therein, * * * and *said air must be made to circulate* through the shafts, levels, stables and working places of each mine."

The instruction continues:

"The purpose of this law is to provide a reasonably safe place for the men to work in, and THAT THE VENTILATION AT THE WORKING PLACES OF THE MEN SHALL BE SUCH AS TO MAINTAIN THEM REASONABLY SAFE FROM DANGEROUS GASES BY A GOOD AND SUFFICIENT VENTILATION OF THE MINE. THIS IS A POSITIVE DUTY IMPOSED ON THE OPERATOR AND OWNER OF THE MINE AND FOR THE NEGLECT OF THIS DUTY THE LAW HOLDS SUCH OPERATOR AND OWNER LIABLE, IF DAMAGES RESULT THEREFROM."

No error is perceived here. No pertinent facts had been shown, making any duty of the mine inspector before the accident material. The instruction is substantially approved in *Costa vs. Pacific Coast Co.*, 26 Wash. 138 (66 Pac. 398)."

Quoting further, at P. 295, the Court approved the following instruction:

"The eighth instruction given was as follows:
"I charge you further that the positive duty

of keeping a good and sufficient ventilation in the mine being on the defendants, as you have been instructed, it matters not who or what persons performed the work or assisted in the work of ventilation. If you should find that it was necessary to keep chute No. 15, or any other chute, open as an airway in order to have a good and sufficient ventilation in chute No. 14, above the first crosscut, and that part of the duty of the *loader* was to keep chute 15 clear, then in that respect, in performing that particular work, he was assisting in performing a positive duty of the defendants to the deceased, and was, as to that work, a vice principal of the defendants, and not a fellow workman of the deceased."

So also in *Delaski vs. Northwestern Improvement Co.*, 61 Wash. 255, at 260 and 261, 112 Pac. 341:

"We think the record discloses at least two STATUTORY breaches of duty upon the part of the respondent. The statute, Rem. & Bal. Code, Sec. 7381 (Bal. Code, Sec. 3165) provides that the owner, agent or operator of every coal mine shall provide in the mine:

"A good and sufficient amount of ventilation for such persons and animals as may be employed therein, the amount of air in circulation to be in no case less than one hundred cubic feet per minute for each man, boy, horse, or mule employed in said mine, and as much more as

the inspector may direct; * * * and said air must be made to circulate through the shafts, levels, stables and working places of each mine." * * *

"*The provisions of the statute measure the respondent's duty.* The legislature, in recognition of the hazards of working in coal mines, has made careful duties upon those who own and operate them. The purpose of the law is to provide a reasonably safe place for the men to work. A failure to observe these provisions is negligence *per se. Green vs. Western American Co.*, 30 Wash. 87, 70 Pac. 310; *Hall vs. West & Slade Mill Co.*, 39 Wash. 447, 81 Pac. 915; *Whelan vs. Washington Lumber Co.*, 41 Wash. 153, 83 Pac. 98, 11 Am. St. 1006; *Pachko vs. Wilkeson Coal & Coke Co.*, 46 Wash. 422, 90 Pac. 436; *Sommer vs. Carbon Hill Coal Co.*, 89 Fed. 54. As was said in the Sommer case, the law is 'in effect, the measure of that reasonable care which the owner or operator of a coal mine is required to take to avoid responsibility for injuries to workmen arising from accidents;' and the duty is a non-delegable one."

The positive duty referred to is the duty to maintain good and sufficient ventilation, which is considered by the legislature necessary on account of the hazardous nature of coal mining.

The Supreme Court, in *Narewaja vs. Northwestern Improvement Co.*, 63 Wash. 391, at 393, held:

"The Statute, Rem. & Bal. Code, Sec. 7381, requires the owner, agent or operator of every coal mine to provide in the mine 'a good and sufficient amount of ventilation for such persons and animals as may be employed therein,' and that the 'air must be made to circulate through the shafts, levels, stables and working places of each mine.' "

In speaking of the duty of the mine owner under this statute, in *Delaski vs. Northwestern Improvement Co.*, 61 Wash. 255, 112 Pac. 341, we said:

"*The provisions of the statute measure the respondent's duty.* The legislature, in recognition of the hazards of working in coal mines, has made careful provisions for their inspection and imposed imperative duties upon those who own and operate them. The purpose of the law is to provide a reasonably safe place for the men to work. A failure to observe these provisions is negligence *per se.*"

"The duty to cause the air to circulate in the working places was a CONTINUING AND IMPERATIVE one upon the appellants, UNDER THE STATUTE."

These cases leave no room for doubt as to the interpretation intended by the Supreme Court of the State of Washington.. It has been decided as plainly as words can convey, that the legislature has imposed upon mine owners the *statutory* obligation of

providing and maintaining good and sufficient ventilation by requiring that the air must be made to circulate through the working places, etc. Some of these cases emphasize one clause of the law not emphasized in the Costa case, namely: "THE AIR SHALL BE MADE TO CIRCULATE THROUGH THE SHAFTS, LEVELS, STABLES AND WORKING PLACES OF EACH MINE." If it is the statutory duty of the mine owner to make the air circulate through the shafts, levels, stables and working places of each mine, how can it be held that it is not a statutory duty of the mine owner to make the air circulate through the working places of the mine during the WHOLE TIME of the operations, and how can it be held that the statute imposes the duty of inspection only once a day? The only way of determining whether there is proper ventilation is by inspection, so that, as expressly held in the Costa case, one whose duty it is to inspect for gas, so far as his duties of inspection are concerned, is a vice principal.

And that continuous ventilation is a statutory duty, was directly decided by the Nalewaja case, last cited, where the Court said, at page 341:

> "The duty to cause the air to circulate in the working places was a *continuing* and *imperative* one upon the appellants, *under the statute.*"

The interpretation given by this Court of the statutes clearly is not in accordance with the decisions

of the State Courts. The various phases of the Costa case have been cited with approval also in:

Christensen vs. Hawley, 61 Wash. at 18;
Ulrickson vs. Soderberg, 69 Wash. at 350;
Richardson vs. Spokane, 67 Wash. at 627, and in
Gennaux vs. Northwestern Improvement Co., 72 Wash. at 275.

The Costa case was also upheld in Page 5 of the decision herein, where the Court said:

> "Much reliance is placed by the appeal upon the decision of the Supreme Court of the State of Washington in the case of *Costa vs. Pacific Coast Company*, 26 Wash. 138, *in which it was held, in effect, that such a gas tester was the personal representative of the company.*"

When the decision in the instant case was first handed down it contained this further clause: "At the time that case arose, however, there was a statute of the State of Washington which provided as follows:" But since this motion was first written notice has been given defendant in error that this Court has substituted for the last sentence, the following sentence: "Under the statute of the State of Washington of 1901 that was undoubtedly so, for it provided as follows:"

This also is incorrect, for there was no law of 1901. The law of 1891 is the one quoted, as heretofore pointed out. It does not appear that this change has

materially altered the basis of the decision. It is apparent that when the decision was rendered this Court was not aware that the last statute had ever been interpreted by the Supreme Court of the State of Washington, and was therefore rendered under a misapprehension of fact, for which defendant in error may be partly responsible. While he pointed out, on page 36 of his brief, that plaintiff in error had made a misstatement in claiming that the Costa case interpreted an old statute since repealed to correct the evils of the Costa decision, yet sufficient emphasis was not given to the same, so it escaped notice and it was perhaps considered unchallenged. The Court may remember, however, that at the oral argument plaintiff in error was forced to admit the incorrectness of his contention, and to admit that the Costa case governed the case at bar.

This Court, in the language above quoted, has expressly approved of the Costa decision, and has stated in so many words that under the decision of that case a gas tester is not a fellow servant with a miner. Consequently, it seems apparent, however this decision might be interpreted, that the Court has erred, for if the Costa case is right, as it is held to be, the decision in the case at bar is wrong, and if the decision is right, the Costa case is wrong. The only question remaining then, is: Acknowledging that the State Courts have interpreted Bal. Code, Sec. 3165, being Rem. & Bal Code, Sec. 7381, as making it a mandatory and non-delegable duty to provide

good and sufficient ventilation and to cause the air to enter the mine, which air must be made to circulate through the working places continuously throughout the whole of the time of the mining operations, so as to prevent any accumulation of gas, does this Court decline to follow such decisions? If the decision herein is correct, the interpretation of the statute by the Washington Supreme Court in the Costa, Delaski, Czarecki and Nalawaja cases and other decisions is incorrect. If it is the intention of this Court not to follow the interpretations of the State Courts upon the statutory law of the State, that intention has not been expressed in the decision herein. If it had been intended by this Court to overrule the interpretation of the Supreme Court of a statute passed seventeen years ago, and first interpreted as making it a statutory and mandatory duty to furnish good and sufficient ventilation continuously during operations some 13 years ago, and many times since affirmed, such intention would have been expressed in no uncertain language, and this Court would have said frankly that, acknowledging that under such Washington decisions a gas tester and fire boss is, by reason of the *statutory* provisions, a vice principal, nevertheless we do not desire to follow the interpretation given this statute by the State Courts, and we hold that it was not the legislative intent to make the duty of continuous ventilation a mandatory, non-delegable and *statutory* one.

Seemingly, the decision herein was based wholly upon a misapprehension, for the original decision ex-

pressly stated that *at the time of the Costa decision* the present statute was not in force. Even with the alteration that has since been made, the decision still seems to be based upon a belief that the Costa case did not interpret the present law. Reference to the Costa decision shows that the injury complained of arose *one* year after the law which the Court seems to have held was interpreted herein had been repealed, and the decision was not handed down until *four* years after the present law was passed repealing the old law, and, as heretofore stated, the language of Judge Hanford's instructions, now held erroneous, was in substance and in fact the language of the Costa decision.

It would seem presumptuous for us to cite cases in support of the proposition that United States Courts should, and are required to, accept the interpretation placed upon state statutes by the highest Court of the state. If this were not so, it would lead to endless confusion. Legislatures desirous of making it a non-delegable duty on the part of a mine owner to prevent an accumulation of gas in a mine, might pass an act which the highest Court of the state holds has properly enacted such a legislative intent, and did make it a positive and non-delegable duty to prevent such accumulation. If the United States Courts might then, declining to follow state decisions, hold that such legislative intent had not been enacted, we would have in effect a law in one Court which is not a law in the other; and to which Court should the

legislature look for its interpretation for the purpose of remedying the evils of the decision of the one Court or the other? If the interpretation of this Court in the case at bar is accepted, the decisions of the State Courts on the statute are overthrown, and there is no non-delegable duty to maintain ventilation throughout the day, and the only duty is to make a test in gaseous mines once a day; in other words, the only duty as to ventilation would be the common law duty.

Unless we misunderstand the decision, this Court holds that the duty of ventilation of a coal mine is not a non-delegable duty, either by statute or under the common law, and that Righi was therefore performing the duties of a fellow servant in attending to the ventilation in the sixth level. We wonder if we made clear in our former brief the division of administrative duties as to ventilation in the mine. It was conceded that the superintendent was first in authority. Under him was a chief fire boss, who had actual charge of the ventilation throughout the whole mine. At each level the ventilation was in the entire control of a fire boss. Each level is in reality a mine by itself, much larger than the ordinary coal mine. Righi, who had charge of the sixth level, it is conceded had about fifty men under his control and it was due to the negligence of Righi in not properly ventilating the sixth level that the gas was allowed to accumulate. The air was not made to circulate properly into all the working places, as required by the statute. The life of every man in the sixth level de-

pended upon the care and competence of one man, Righi.

We most respectfully petition that this Honorable Court re-examine the Costa case, to determine if it is not a fact that *the present statutory law was in force, not only at the time of the injury complained of in the Costa case, but had been in force for four years before the decision therein was promulgated.* That the Court also examine the line of decisions herein cited, which clearly show that the Supreme Court has many times held that it is a STATUTORY duty to MAINTAIN ventilation CONTINUOUSLY to PREVENT ANY ACCUMULATION OF GASES; and to determine whether or not this Court committed error in holding that the operator of the mine is responsible for only such care as the common law imposes upon him other than the daily examination, which seems to be the holding expressed in the following language, used at page 7: "Conceding that, notwithstanding this specific provision of the Washington statute requiring the examination every morning by a competent person with a safety lamp of every working place in such mines, and the entry in a book kept for that purpose of the result of such examination, the operator is still responsible for such further care as the common law imposes upon him, that law does not make of such an employee as Righi in the instant case, the representative of the master; * * *." It is our contention that there is not merely the common law obligations, but a specific statutory duty to pro-

vide sufficient ventilation and make the air circulate through every working place of the mine continuously to the end that the place may be made reasonably safe by removing dangerous gases through such ventilation.

We submit that whatever might have been the interpretation of this Court of the said statute if the question were an open one, interpretation having already been made many times by the highest Court of the state, and such interpretation being certainly a reasonable construction, and such construction of a 17 year old statute having become the settled law of the state for 13 years, that, under these circumstances, this Court should hold in effect that it is bound by such interpretation, and that, under such construction, the instructions of the trial judge were correct and a rehearing should be granted and the decision of the lower Court affirmed.

Respectfully Submitted,

H. R. LEA,
Attorney for Defendant in Error.

I, H. R. Lea, attorney for the defendant in error above named, do hereby certify that the above motion for rehearing is, in my judgment, well founded in law and in fact, and that the said motion is not interposed for delay.

H. R. Lea

Attorney for Defendant in Error.